Supreme Court, U.S.
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No. 01-_____

In the

Supreme Court of the United States

Katherine Harris, in her official capacity
as Secretary of State of Florida, et al., *Petitioners*,

v.

The Rev. Dr. James Armstrong, et al., *Respondents*.

On Petition for Writ of Certiorari
to the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General of Florida

THOMAS E. WARNER
Solicitor General

Carolyn Snurkowski* **Charmaine Millsaps**
Assistant Attorney General Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol - PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

**Counsel of Record*

QUESTIONS PRESENTED

In November 1998 the voters of the State of Florida overwhelmingly approved an amendment to the Florida Constitution to preserve the death penalty. In September 2000 the Florida Supreme Court invalidated that amendment purporting to find the ballot summary defective.

The Questions Presented are:

I. WHETHER THE FLORIDA SUPREME COURT'S INVALIDATION OF A STATE CONSTITUTIONAL AMENDMENT POST VOTER APPROVAL PREDICATED UPON A NEWLY CREATED STANDARD VIOLATES DUE PROCESS?

II. WHETHER THE FLORIDA SUPREME COURT'S INVALIDATION OF A STATE CONSTITUTIONAL AMENDMENT POST VOTER APPROVAL VIOLATES THE FEDERAL CONSTITUTIONAL GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT?

LIST OF PARTIES

None of the parties to this proceeding are corporate entities for purposes of Rule 29.6. The parties to this proceeding are:

Petitioners (Defendants/Appellees below):

Katherine Harris, in her official capacity as Secretary of State of Florida
John Ellis Bush, in his official capacity as Governor of Florida
Robert Butterworth, in his official capacity as Attorney General of Florida

Respondents (Plaintiffs/Appellants below):

The Rev. Dr. James Armstrong
The Rev. Dr. Douglas Borko
The Rev. Dr. Jimmie L Gentle
Kathy Barber Hersh
Thomas A. Horkan, Jr.
The Rev. Fred B. Morris
The Rev. Franklin P. Smith
The Rev. Dr. Barry Snowden

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PETITION FOR WRIT OF CERTIORARI

The State of Florida, through the officials named in this proceeding,[1] respectfully petitions the Court for a writ of *certiorari* to review the judgment of the Florida Supreme Court which struck from the Florida Constitution an amendment unanimously proposed by the Legislature and approved by 72.8% of the electors at the November 1998 general election because the court determined that the amendment's ballot title and summary were misleading.

OPINIONS BELOW

The opinion of the Florida Supreme Court, issued September 7, 2000, is reported at 773 So.2d 7 (Fla. 2000), and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-59a. The order denying rehearing of that decision is reproduced at Pet. App. 68a. The unpublished order of the trial court vacated by the Florida Supreme Court is reproduced at Pet. App.63a-64a.

The unpublished orders of the Florida Supreme Court declining review of the amendment's ballot title and summary prior to the 1998 general election are reproduced at Pet. App. 60a and 61a. The unpublished order of the trial court rejecting

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[1] The Petitioners are the State officials named as defendants below: Secretary of State Katherine Harris, Governor John Ellis Bush and Attorney General Robert Butterworth. Each official was named in his/her official capacity and therefore will be collectively referred to in this Petition as "State." *See Thompson v. Wainwright*, 714 F.2nd 1495,1500 (11th Cir. 1983).

Respondents' pre-election challenge to the amendment's ballot title and summary is reproduced at Pet. App. 65a-67a.[2]

JURISDICTION

The judgment of the Florida Supreme Court was entered December 5, 2000, when the court denied rehearing of its September 7, 2000, decision in this case. Pet. App. 68a. This Court has jurisdiction under 28 U.S.C. § 1257.

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

Section 4 of Article IV of the United States Constitution provides in relevant part:

> The United States shall guarantee to every State in this Union a Republican form of Government, ...

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . .; nor shall any State deprive any person of life, liberty or property, without due process of law; . .

Section 1 of Article I of the Florida Constitution provides:

> SECTION 1. Political powers.--
>
> All political power is inherent in the people....

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[2] The Appendix does not include the unpublished orders of the First District Court of Appeal certifying Respondents' appeals (both pre- and post-election) to the Florida Supreme Court as involving issues of great public importance and requiring immediate resolution.

Sections 1 and 5 of Article XI of the Florida Constitution provide:

> SECTION 1. Proposal by legislature.- Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.
>
> SECTION 5. Amendment or revision election.--
>
> (a) A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution, initiative petition or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the secretary of state, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature and limited to a single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.
>
> (b) Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published.

(c) If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

STATEMENT OF THE CASE

Overview. At its 1998 regular session, the Florida Legislature proposed an amendment to the Florida Constitution pursuant to its express authority in article XI, section 1 of the Florida Constitution. The Florida Supreme Court had two opportunities to review the ballot title and summary for the proposed amendment prior to the election, but declined to do so. Pet. App. 60a and 61a. Subsequently, the amendment was approved by 72.8% of the electors at the general election held November 3, 1998. The Florida Supreme Court, *nearly two years after the election*, struck the amendment from the Florida Constitution based upon the court's subjective determination that the ballot title and summary for the amendment violated an "accuracy requirement" *implicit* in the Florida Constitution. Pet. App. 29a-33a.

The Amendment. At its 1998 regular session, the Florida Legislature proposed an amendment to article I, section 17 of the Florida Constitution.[3] Pet. App. 41a. The full text of the proposed amendment was:

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[3] The amendment was proposed by joint resolution, House Joint Resolution No. 3505, and was *unanimously* approved by both the House of Representatives and the Senate. The Florida Constitution requires only that the joint resolution be "agreed to by three-fifths of the membership of each house of the legislature." *See* art. XI, § 1, Fla. Const.

SECTION 17. Excessive punishments.--Excessive fines, cruel and ~~or~~ unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

Pet. App. 110a-111a (proposed deletions ~~stricken~~; proposed additions underscored).[4] The ballot title and summary drafted by the Legislature for the proposed amendment were:

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[4] House Joint Resolution No. 3505 was signed by the legislative officers and filed with the Secretary of State on May 5, 1998. Pet. App. 111a. The proposed amendment, designated "Amendment No. 2" by the Florida Secretary of State, was published in accordance with article XI, section 5 of the Florida Constitution and was placed on the ballot for the November 3, 1998, general election.

BALLOT TITLE: PRESERVATION OF THE DEATH PENALTY; UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT

BALLOT SUMMARY: Proposing an amendment to Section 17 of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability. Pet. App. 111a.

Respondents' Pre-election Challenge. On October 9, 1998 (approximately 3 weeks before the 1998 general election and five months after the amendment was proposed by the Legislature), Respondents filed an original action in the Florida Supreme Court to have Amendment No. 2 removed from the ballot because its ballot title and summary were misleading as a matter of law. Pet. App. 1a, 40a. On October 19, 1998, the Florida Supreme Court by a 4 to 3 vote denied Respondents' petition "without prejudice to file an appropriate action in the circuit court." Pet. App. 60a. The following day, Respondents filed suit in circuit court alleging the same deficiencies. The circuit court denied that relief, Pet. App. 65a, and Respondents appealed to the Florida Supreme Court.[5] On November 2,

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[5] The appeal was filed with the First District Court of Appeal which certified the case to the Florida Supreme Court as involving issues of great public importance and requiring immediate resolution. Pet. App. 2a.

1998 (the day before the 1998 general election), the Florida Supreme Court dismissed Respondent's appeal. Pet. App. 61a.

The Electors Approve the Amendment. Amendment No. 2 was approved by 72.8% of the electors at the general election held November 3, 1998.[6] Pet. App. 2a. The amendment became an effective part of the Florida Constitution on January 5, 1999. *See* art. XI, § 5(c), Fla. Const.

Respondents' Post-election Challenge. On December 3, 1998, Respondents filed an amended petition with the circuit court, again claiming that the ballot title and summary were misleading as a matter of law. Pet. App. 3a. On February 25, 1999, the circuit court denied Respondents' petition and granted summary judgment in favor of the State. Pet. App. 63a. The First District Court of Appeal again certified the case to the Florida Supreme Court. Pet. App. at 4a.

The Florida Supreme Court accepted jurisdiction and the case was briefed and argued. After oral argument, the State filed a supplemental brief addressing questions raised at oral argument regarding the court's authority to review the ballot title and summary of a legislatively-proposed amendment, as well as the court's authority to invalidate a constitutional amendment after it has been approved by the electors. Pet. App. 70a-86a. In that brief, the State argued that the court was without authority to frustrate the will of the people by invalidating an approved amendment to *their* constitution.

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[6] The official vote was 2,676,043 in favor of the amendment and 1,002,043 against the amendment. A simple majority is required for approval of an amendment to the Florida Constitution. *See* art. XI, § 5(c), Fla. Const.

The Florida Supreme Court on September 7, 2000, reversed the circuit court and ordered that the amendment be "stricken" because the ballot title and summary were "clearly and conclusively defective." Pet. App. 1a-59a. The majority opinion, written by Justice Shaw,[7] acknowledged that the Florida Constitution does not contain "any requirements" for legislatively-proposed constitutional amendments other than the procedural requirements in article XI, sections 1 and 5. Pet. App. 11a. Nevertheless, the majority read into section 5 an *implicit* "accuracy requirement." Pet. App. 7a. The majority explained that this new-found, post-election requirement precludes the Legislature from "hiding the ball" by not specifying the "chief purpose" or "main effect" of the amendment in the ballot summary, and also prevents an amendment from "flying under false colors." Pet. App. 17a.

Based on this *implicit* "accuracy requirement", the majority concluded that the amendment "flies under false colors" because the ballot summary "impl[ied] that the amendment will promote the rights of Florida citizens through the rulings of the United States Supreme Court" but that the amendment would actually nullify state constitutional rights, Pet. App. 21a; the ballot summary "hid[] the ball" by not explaining that the chief purpose or main effect of the amendment was to "nullify the Cruel or Unusual Punishment Clause [of the Florida Constitution.]" Pet. App. 22a; and, rejected the proposition that the Court was without power to invalidate the amendment

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[7] The concurring opinions of Justices Harding and Pariente agree that the Court has authority to review legislatively-proposed constitutional amendments and that such amendments should be evaluated against the implicit "accuracy requirement" announced by Justice Shaw. Pet. App. 33a, 37a. Justice Lewis, in his dissent, agreed with the majority on that point, but disagreed with the result reached by the majority. Pet. App. 53a-54a.

post-election because "the popular vote was not based on the whole truth but on part truth." Pet. App. 29a.

Chief Justice Wells dissented,[8] finding that "...[t]here is simply no constitutional authority for a judicial veto of a legislatively proposed amendment[.]" Pet. App. 47a, and "Since the Constitution does not expressly give the Court this power [to review legislatively proposed amendments], I must conclude that the Court should not assume it by implication." Pet. App. 49a.

The State timely filed a motion for rehearing,[9] arguing: "The opinion of this Court has fundamentally affected the right of the people to amend their constitution and strikes at the very heart of the electoral process and our republican form of government." Pet. App. at 91a (emphasis original). It took issue with the court's conclusion that the "chief purpose" of the amendment was to nullify state constitutional rights; instead, the State pointed to record evidence that the "chief purpose" of the amendment was to restrict the authority of the Florida Supreme Court, particularly in regards to its death penalty

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[8] Justices Lewis and Quince also dissented. As noted above, Justice Lewis agreed with the majority regarding the Court's authority to review legislatively-proposed constitutional amendments for "accuracy"; however, he would have affirmed the circuit court's decision based upon the Respondents delay in bringing their challenge. Pet. App. 54a. Justice Quince agreed with Chief Justice Wells' conclusion that "the Legislature did not mislead the Florida voters." Pet. App. 58a.

[9] The State also challenged the court's conclusion that the ballot summary was defective for failing to adequately explain the change from "cruel or unusual" to "cruel *and* unusual" in light of the fact that the court had never explained the distinction, if any, in light of this Court's Eighth Amendment jurisprudence. Pet. App. 105a.

jurisprudence. Pet. App. 101a-104a.[10] The State's motion for rehearing was denied December 5, 2000. Pet. App. 68a.

REASONS FOR GRANTING THE WRIT

Unlike the recent Presidential Election cases where the Florida Supreme Court consistently stated that "the will of the people is the paramount consideration" and that "every citizen's vote [should] be counted,"[11] the court's decision in this case has precisely the opposite effect. Under any theory or argument, the citizens of Florida, who by the exercise of their most fundamental of rights approved an amendment to their organic law, had their will eviscerated and their collective vote discounted by the Florida Supreme Court. This is a classic demonstration of voter disenfranchisement. This Court's review provides the only effective check on the Florida Supreme Court's overreaching action.

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[10] Specifically, the State cited various newspaper articles judicially noticed by the trial court which explained the purpose of Amendment No. 2 to the voters as follows: "[T]he amendment suspends the Florida Supreme Court's jurisdiction over the death penalty and gives it to the U.S. Supreme Court" *and* "[I]t pre-empts the Florida Supreme Court from determining what constitutes 'cruel and unusual,' and it would force the state court to abide by the U.S. Supreme Court's definition in such cases." Pet. App. 103a-104a.

[11] *See Palm Beach County Canvassing Board v. Harris*, 25 Fla. L. Weekly S1085, S1086, S1089-90 (Fla. Nov. 28, 2000) (corrected opin.) (ordering Secretary of State to accept selective manual recounts as part of certified election results), *vacated sub nom Bush v. Palm Beach County Canvassing Board*, 121 S.Ct.471 (2000) (per curiam), *on remand*, 25 Fla. L. Weekly S1126 (Fla. Dec. 11, 2000), *and see Gore v. Harris*, 25 Fla. L. Weekly S1112, S1115 (Fla. Dec. 8, 2000) (ordering manual recounts in Miami-Dade County and statewide), *rev'd sub nom Bush v. Gore*, 121 S.Ct. 525 (2000) (per curiam).

I. THE FLORIDA SUPREME COURT'S INVALIDATION OF A CONSTITUTIONAL AMENDMENT POST VOTER APPROVAL PREDICATED UPON A NEWLY CREATED STANDARD VIOLATES DUE PROCESS.

THE ARMSTRONG DECISION. The Florida Supreme Court, in *Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000), Pet. App. 1a-59a, in striking an enacted amendment to the Florida Constitution, created an implicit accuracy requirement in article XI, section 5, of the Florida Constitution and concluded that the ballot summary used to describe the amendment was not accurate and therefore, the electoral process was compromised. Pet. App. 32a. While acknowledging the actual text of amendment or revision election provision, article XI, section 5, of the Florida Constitution does not contain an "accuracy requirement," the *Armstrong* Court held that an accuracy requirement was "implicit in this provision" because if the ballot summary was not accurate, "voter approval would be a nullity." Pet. App. 7a. The court reasoned that the ballot summary was misleading for two reasons: (1) it did not inform the voters that the "or" in the current Florida Constitution's punishment clause would be changed to "and," and (2) it did not inform the voters that the amendment would affect all criminal punishments, not just the death penalty. Pet. App. 21a. "A citizen could well have voted in favor of the proposed amendment thinking that he or she was protecting state constitutional rights" when they, in fact, were voting to nullify those rights. Pet. App. 21a.

Adopting this amendment was not viewed by the voters as a matter of nullifying state rights; rather, it was viewed as a means of reining in the Florida Supreme Court. *Florida v. Casal*, 462 U.S. 637, 103 S.Ct. 3100, 3101-3102, 77 L.Ed.2d 277 (1983) (Burger, C.J., concurring)(agreeing that writ should

be dismissed because the judgment rested on state law,[12] observing however, that the citizens of Florida have the power to "ensure rational law enforcement" by amending their laws including their state constitution; that the "people of Florida have since shown acute awareness of the means" to prevent such an outcome; and explaining that the people of Florida did so in the November 1982 general election.)[13] Voters in 1998, viewed this latest amendment just as former Chief Justice Burger did, and did just what former Chief Justice Burger suggested they do: amend their state constitution to prevent the Florida Supreme Court from interpreting the state constitution in a manner that differed from the requirements of federal constitutional law. The voters viewed this amendment not as

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[12] The decision of the Florida Supreme Court was based on art. 1, § 12 of the Florida Constitution which required suppression of over 100 pounds of marijuana which was an "untoward result" not required by the federal constitution.

[13]The Florida electorate, by amending their State Constitution to require conformity with the United States Constitution, as interpreted by the United States Supreme Court which "ensures that the Florida courts will no longer be able to rely on the State Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States," were unfettered in the exercise of that right. *Grose*, concerned the ambiguity of the ballot summary of a proposed constitutional amendment requiring the Florida Supreme Court to conform its decisions to the decisions of the United States Supreme Court on search and seizure matters. While the Appellants' filed their challenge to the ballot summary 11 days before the November 2, 1982 election, the Florida Supreme Court, the day before the election, determined that the "wording of the ballot summary" was "unambiguous and clearly states the amendment's chief purpose...." Simply put, "the ballot must give the voter fair notice of the decision he must make." *Grose v. Firestone*, 422 So 2d at 305. The court rejected the Appellants' contention that an exhaustive explanation reflecting an interpretation of the amendment and "its possible future effects" was "not required in the ballot summary." *Grose v. Firestone* 422 So. 2d at 305.

a matter of nullifying their rights but as a check on state judicial activism.

FEDERAL QUESTION. The Florida Supreme Court's arbitrary conduct and retroactive disenfranchisement of the entire election in *Armstrong*, violates federal constitutional procedural due process.

In *Kohler v. Tugwell*, 292 F.Supp. 978 (E.D.La. 1968), a three judge district court panel held that ballot language associated with an amendment to the Louisiana Constitution which was difficult to understand did not deny the voters due process. Plaintiffs, citizens of Louisiana, sought an injunction on the ground that the ballot language misled the voters. Relying on *Reynolds v. Sims* , 377 U.S. 533, 554, 84 S.Ct. 1362, 1377, 12 L.Ed.2d 506 (1964), the court concluded that the question of whether the voters were informed by the ballot summary of the subject of the proposed amendment was a federal question involving the Due Process Clause[14]. *Kohler*, 292 F.Supp at 981. While describing the language of the amendment as "inartistic," "meaningless," "confused," "ambiguous" and maybe even "unintelligible," *Kohler*, 292 F.Supp at 980, the court opined that the reason the ballot summary was difficult to understand was that the amendment itself was difficult to understand. The court observed that the

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[14] The Louisiana Constitution did not require that the full text of the amendment appear on the ballot. However, the full text was required to be published in the newspaper of each parish twice within a certain number days prior to the election. That provision was complied with. Specifically, plaintiffs contended that the ballot summary was written in a manner that led voters to believe that tolls over a bridge would be reimposed as soon as the amendment was enacted; whereas, actually, tolls would be imposed only when the bridges were completed. Likewise, Sec. 101.171, Fla. Stat. requires the posting of a full text of the constitutional amendment at every polling location.

full text was available. It was up to the voter to study the actual text, and come to the polls prepared in advance if they are to vote with any understanding. *Kohler*, 292 F.Supp at 981. Because voters had notice of the full text through publication in newspapers, all procedural due process requirements were met. This Court summarily affirmed. *Kohler v. Tugwell*, 393 U.S. 531, 89 S.Ct. 879, 21 L.Ed.2d 755 (1969).[15]

The Court has also addressed state voting laws regarding state elections as presenting federal questions.[16] Numerous federal circuits have addressed similar challenges to state elections as federal questions. *McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir.1983) (Kennedy, J.,

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[15] *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959)(observing that summary affirmances are votes on the merits of a case); *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975)(distinguishing between appellate jurisdiction where there is no discretion to refuse adjudication of the case on its merits and certiorari jurisdiction where there is such discretion and noting that lower courts are bound by summary decisions of this Court until such time as this Court informs them that they are not); *but see Bowers v. Hardwick*, 478 U.S. 186, 189 n.4, 106 S.Ct. 2841, 2843, n.4, 92 L.Ed.2d 140 (1986). In *Kohler* the court explicitly noted that "a federal court must not interfere with the internal affairs of a State unless it is necessary" to protect federal constitutional rights. *Kohler*, 292 F.Supp at 981. Noting *Reynolds v. Sims*, the court observed that the federal constitution protects the rights of all qualified voters in state as well as federal elections. *Kohler*, 292 F.Supp at 981 n. 13, *citing, Hotard v. City of New Orleans*, 335 U.S. 803, 69 S.Ct. 57, 93 L.Ed. 360 (1948).

[16] *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)(deciding in a state election to the Hawaii House of Representatives that Hawaii's prohibition on write-in voting as interpreted by the State Supreme Court did not violate the First Amendment); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)(striking an Alabama scheme that had resulted in state legislative districts of widely disparate size as a violation of equal protection).

concurring)(stating that federal courts will invalidate state election results where there are severe violations of established constitutional norms and severe disenfranchisement warrants federal equitable relief citing *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir.1978)).[17] Thus, state elections that violate due process do present a federal question.

Moreover, concerns of federalism underlying the federal question requirement do not apply to this case. Normally, federalism concerns improper invasion of state sovereignty, but, here, the elected representatives of a state unanimously proposed an amendment and the great majority of the state's electorate voted for that amendment.[18] At issue here is the

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[17] The First, Second, Fifth, Seventh, Ninth and Eleventh Circuits also have done so. *Griffin v. Burns*, 570 F.2d 1065 (1st Cir.1978); *Gelb v. Board of Elections of City of New York*, 224 F.3d 149,153 (2d Cir. 2000)(explaining that a federal court will intervene where state laws impose impermissible burdens on the right of qualified voters, regardless of their political persuasion, to cast their votes effectively); *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. 1981)(stating that serious violations of state election law which undermine the basic fairness or integrity of the democratic system are violations of the Fourteenth Amendment due process clause); *Bennett v. Yoshina*, 140 F.3d 1218, 1226-1227 (9th Cir 1998)(explaining that a court will strike down an election on due process grounds if there is significant disenfranchisement that resulted from a change in the election procedures); *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970)(holding due process requires the election be conducted in accordance with established guidelines and that unannounced eleventh hour changes may not be used); *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir.1995)(explaining that while federal courts do not involve themselves in garden variety election disputes, if the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order).

[18] Normally, there is an assumption that decisions of state courts are definitive pronouncements of the will of the States as sovereigns. *Bush v. Gore*, 121 S.Ct. 525, 534 (Rehnquist, C.J. concurring). However, here,

preservation of a popularly-approved amendment; there are no improper invasion concerns.[19]

Indeed, both state and federal courts are currently struggling to answer the issue of what notice of a measure a voter must

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that assumption clearly is not warranted. The legislators unanimously proposed and the citizens of Florida overwhelmingly voted to enact this amendment. The decision in *Armstrong* is in direct contravention of the Florida electorate and their elected representatives. Whether voting for or against the amendment, the electorate had a right to express their views as to the issue at hand. As observed in *Bush*, it is fundamental that state courts be free from federal interpretation of state constitutions, "...it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action...." *Bush v. Palm Beach County Canvassing Board*, 121 S. Ct. 471, 476 (2000).

[19] Two of the reasons advanced for "our federalism" are that it increases opportunity for citizen involvement in democratic processes and operates to reduce the risk of tyranny. *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991)(observing that a healthy balance of power between the states and the federal government will reduce the risk of tyranny and abuse from either front). Alexander Hamilton explained one of the advantages of federalism was that it would lessen the ability of either the federal or state government to establish a tyranny because the federal government will at all times stand ready to check the usurpations of the state governments and the state governments would act likewise toward the federal government with the result that the people would be the masters of their own fate. If the people's rights are invaded by either, they can make use of the other as the instrument of redress. The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961). That is exactly what the people of Florida seek in federal court - to redress the Florida Supreme Court's denial of their vote and to change their state constitution. *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)(explaining that the U.S. Constitution does not protect the sovereignty of the states for the benefit of the states or for the benefit of the state's public officials; rather, the purpose of federalism is to protect the liberties of the citizens of the states). This Court will not be invading state sovereignty; rather, it will be restoring it.

have before voting. Review is warranted to answer that question. *See Jones v. Bates*, 127 F.3d 839 (9th Cir.1997)(holding a California proposition enacted by the voters was invalid because the proposition and the ballot materials did not provide the voters with sufficient notice), *reversed*, 131 F.3d 843 (9th Cir. 1997) (en banc)(a majority opinion finding no notice problem and reinstating the amendment; the concurring opinion asserting no due process right to notice in an election), *cert. denied*, 523 U.S. 1021, 118 S.Ct. 1302, 140 L.Ed.2d 468 (1998); *Burton v. State of Georgia*, 953 F.2d 1266 (11th Cir. 1992)(holding ballot summary prepared by the Georgia legislature for a proposed amendment to the state's constitution was not misleading but concurring opinion finding summary misleading as a matter of law). States are holding costly elections only to have those election results stricken by courts. More important than the expense is preservation of the right to vote and to amend the constitution. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir. 1997)(observing that a system which permits a judge to block with the stroke of a pen what over 4 million state residents voted to enact as an amendment to the California Constitution tests the integrity of our constitutional democracy). The Court should reverse the holding in *Armstrong*, finding that due process requires only that the full text of the amendment be available pursuant to the "explicit, existing" law in Florida.

PROCEDURAL DUE PROCESS--RETROACTIVE DISENFRANCHISEMENT. The Due Process Clauses of the Fifth and Fourteenth amendments restrict the ability of courts to retroactively apply new legal principles. *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)(concluding that the South Carolina Supreme Court's interpretation of a state statute beyond what a fair reading provided, contrary to their precedent, was a violation of due

process); *Bush v. Gore*, 121 S.Ct. 525 (2000)(Rehnquist, C.J. concurring)(applying *Bouie* to an election case). A state judiciary is prohibited from creating new laws governing elections after the election occurs because such actions result in retroactive disenfranchisement. *Roe v. Alabama*, 43 F.3d 574 (11th Cir.1995)(finding a violation of due process even where there was overcounting of absentee ballots rather than undercounting due to change in the rules governing validity of absentee ballots after the election occurred). Retroactive disenfranchisement violates procedural due process.[20] The standards governing an election must be established prior to the election and the validity of any election must be judged according to those standards.

In *Griffin v. Burns*, 570 F.2d 1065 (1st Cir.1978), the First Circuit held that the retroactive invalidation of absentee and shut-in ballots was a due process violation. The election involved was a primary to select the democratic candidate for city council. Election officials, mistakenly believing that absentee and shut-in voting was authorized in primaries, advertised in newspapers that absentee and shut-in ballots were available and issued these types of ballots. The total number of absentee and shut-in ballots was 123 out of 1356 total votes or approximately ten percent of the total vote. One candidate was the winner if the absentee and shut-in ballots were counted but another candidate won if the absentee and shut-in ballots were not counted. The Rhode Island Supreme Court held, after the elections, that absentee and shut-in voting were not legally

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[20] *Bennett v. Yoshina*, 140 F.3d 1218, 1226-1227 (9th Cir 1998)(explaining that a court will strike down an election on due process grounds if there is significant disenfranchisement that resulted from a change in the election procedures); *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970)(holding due process requires the election be conducted in accordance with established guidelines and that unannounced eleventh hour changes may not be used).

authorized in primaries. *McCormick v. State Board of Elections*, 378 A.2d 1061 (R.I. 1977).

Four days after the Rhode Island Supreme Court's decision, the Rhode Island General Assembly enacted a new statute authorizing absentee and shut-in ballots in future primaries. Plaintiffs, the losing candidate, an absentee voter and a shut-in voter filed a § 1983 challenge in federal court. The district court ordered that a new primary be conducted. A new primary was held in which the absentee and shut-in voters were allowed to vote via such ballots because of the new statute and Griffin won. Defendant argued that principles of comity and federalism restricted the federal court's intervention in the matter. *Griffin*, 570 F.2d at 1070. The *Griffin* Court held that this was a federal question over which they had jurisdiction and that the state supreme court's retroactive invalidation of the absentee and shut-in ballots violated the voters' rights under the Fourteenth Amendment. *Griffin*, 570 F.2d at 1070. The *Griffin* Court explained that while normal election irregularities do not usually rise to the level of constitutional violations, there are some cases where a federal role is appropriate because the right to vote is a federally protected right. *Griffin*, 570 F.2d at 1076. "If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 is therefore in order."

The First Circuit described as meritless both the argument that not counting the plaintiffs' votes is the sort of hardship that must be borne as the consequence of the state court's ruling on a disputed legal issue and that election irregularities of this sort are beyond the ken of a federal court. *Griffin*, 570 F.2d at 1075. The *Griffin* Court observed that an election conducted under these circumstances was unfair. *Griffin*, 570 F.2d at 1076. The court explained that when voters are given ballots

by election officials that, unsuspected by all, are invalid, state law may forbid counting the ballots, but the election itself becomes a flawed process. The *Griffin* Court explained that federal court was the only practical forum for redress, in part, because the state supreme court did not address the questions that retroactive application of its ruling would create. *Griffin*, 570 F.2d at 1079. *See also Roe v. Alabama*, 43 F.3d 574 (11th Cir.1995)(finding federal due process violation due to disenfranchisement where the prior Alabama practice had been not to count absentee ballots unless they were notarized and witnessed; but after the election, an Alabama court ordered the improper absentee ballots to be counted); *Cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) (holding state supreme court's interpretation of state law denied plaintiff's federal due process right to be heard).

Unlike *Griffin*, which involved the disenfranchisement of 10% of the voters, here, 100% of the electorate has been disenfranchised. This disenfranchisement was patent and fundamentally unfair. Like *Griffin*, the court in *Armstrong* did not address how the retroactive application of its newly created constitutional "accuracy requirement" would impact the rights' of voters. The *Armstrong* Court was apparently completely unaware of the due process implications of its holding.

The Florida Supreme Court created two new rules governing elections that did not exist prior to the election. For the first time after the election, the Florida Supreme Court posited the existence of a constitutional "accuracy requirement" in ballot summaries, where there was (and is) no accuracy requirement enunciated in the Florida Constitution.[21] The

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[21] The actual text of the amendment or revision election provision provides:

Armstrong Court then struck an explicit provision of Florida's constitution because it did not comply with this newly created implicit provision. Never before had this provision been interpreted to include an implicit accuracy requirement.

Secondly, the court created a rule, directly contrary to its precedent, that the ballot summary must inform the voters of the possible effects of the amendment.[22] The court stated that the effect of the amendment outstripped the stated purpose of preserving the death penalty because the amendment applies to all criminal punishments, not just the death penalty. *Armstrong*, Pet. App. 21a; however, the amendment does not affect any penalty other than the death penalty under current Florida jurisprudence. The amendment does not affect proportionality review of non-capital cases. Florida courts currently employ the same test as federal courts in determining whether a sentence other than death violates the punishment clause; namely, the *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct.

> A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution, initiative petition or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature and limited to a single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.

Art. XI, § 5 (a), Fla. Const.

[22] Ballot summaries simply provide notice of the purpose of the amendment. *Grose v. Firestone*, 422 So.2d 303, 305 (Fla. 1982), citing, *Smathers v. Smith*, 338 So.2d 825 (Fla.1976)(noting that the inclusion of all possible future effects is not required in a ballot summary).

2680, 115 L.Ed.2d 836 (1991) test.[23] The amendment does preclude the possibility that Florida Courts would, in the future, develop a different proportionality test based on the textual differences in the Florida Constitution. However, that is merely a possibility, not a current, actual effect. The Florida Supreme Court never before required the voters be informed of such possibilities. Prior to this case, there existed no requirement that the Legislature include all possible effects of a proposed constitutional amendment in the ballot summary. *Grose v. Firestone*, 422 So. 2d 303 (Fla. 1982); *Smathers v. Smith*, 338 So. 2d 825 (Fla.1976).

Creation of either new rule post-election violates the Fifth and Fourteenth Due Process Clauses.

PROCEDURAL DUE PROCESS--ARBITRARY CONDUCT. As Justice Scalia observed, counting first, and then ruling upon the legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires. *Bush v. Gore*, 121 S.Ct 512 (2000)(Scalia, J., concurring). Likewise, voting on an amendment first and then ruling on whether the amendment used "clear and unambiguous language" is not a recipe for

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[23] *Gibson v. State*, 721 So.2d 363,368 (Fla. 2d DCA 1998)(noting that Florida courts have the power to declare sentences "cruel or unusual" under article I, section 17 of the Florida Constitution or "cruel and unusual" under the Eighth Amendment, but explicitly applying *Harmelin* and concluding that mandatory life imprisonment for sexual battery does not constitute cruel "or" unusual punishment); *Williams v. State*, 630 So.2d 534 (Fla.1993)(holding that there can be proportionality review of criminal penalties other than death under article I, section 17 of the Florida Constitution); *Hale v. State*, 630 So.2d 521 (Fla.1993)(agreeing that the United States Constitution provides a guarantee of proportionality in non-capital cases and discussing the gross disproportionality test of *Harmelin* and explaining the textual difference between Florida's constitution and the U.S. constitution but declining to formulate a different state test) .

producing election results that have the public acceptance democratic stability requires. In *Bush v. Gore*, 121 S.Ct 525 (2000), the Court concluded that the Florida Supreme Court's recount mechanisms did not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right to vote. *Bush*, 121 S.Ct at 530. Although the Court employed an equal protection analysis, it also explained that Due Process required adequate statewide standards in recounting. *Bush*, 121 S.Ct at 532.

In *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), the Court unanimously held due process was violated when a remedy existed at the time the taxpayer paid the disputed taxes and then a state supreme court declared that no such remedy exists. While a state may develop their own remedies, a state may not reconfigure its remedies, unfairly, in midcourse. This Court noted that states often prefer that taxpayers "pay first, litigate later" and that it was especially unfair to penalize a taxpayer who respected that preference. The *Reich* Court referred to a state supreme court changing the law after a taxpayer relied on that law as "bait and switch". The *Reich* Court cited and analogized to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). The Court in *NAACP* had reasoned that novelty in procedural requirements cannot be permitted against those who justifiably relied upon prior decisions of state courts. *NAACP*, 357 U.S. at 457-458, 78 S.Ct., at 1169.[24]

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[24] The logic of *Reich* is not limited to tax cases. *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 539, 118 S.Ct. 2131, 2154, 141 L.Ed.2d 451 (1998)(Kennedy, J., concurring in the judgment and dissenting in part)(explaining that retroactive imposition of liability violates due process).

Here, as in *Reich*, the Florida Supreme Court unfairly changed its course. The Florida Supreme Court clearly had before it prior to the election the issue of whether the ballot title and summary were misleading, yet the court twice declined to rule. The critical event then, was the election. Any remedy available prior to the election, such as rewording of the ballot summary to include any omissions identified by the court, was no longer available after the election. The Florida Supreme Court's refusal to decide whether the ballot summary was clear prior to the election, but then declaring the summary insufficiently clear after it was enacted, was arbitrary. Just as parties must bring clarity challenges prior to the election, courts must adjudicate clarity challenges prior to the election.[25] Having specifically ruled that the parties were not dilatory in bringing the challenge, the Florida Supreme Court may not refuse to hear a clarity challenge prior to the election, but then rule on the matter after the voters have enacted it.

Moreover, striking an enacted constitutional amendment because it violated a statute was equally arbitrary.[26] A court

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[25] *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1180-81 (9th Cir. 1988)(holding that laches barred opponents from seeking to invalidate a state election based on equal protection post-election because of the havoc it wreaks upon local political continuity); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir.1983)(explaining that failure to require pre-election adjudication would permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action).

[26] The legislature has since amended this statute to not require ballot titles or summaries for legislatively proposed amendment. Ch. 2000-361, § 1, Laws of Fla. The statute now states: "[e]xcept for amendments and ballot language proposed by joint resolution," prior to the sentence "the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure."

may not strike a constitutional amendment that has been enacted because it violates a statute. "Unstatutory constitutional provisions" do not exist. After an amendment becomes a part of the organic law of the state, it is immune from "statutory based" clarity challenges. Once enacted, the Florida Supreme Court loses its statutory authority to review it. This amendment passed and was part of Florida's constitution. A statute has never been employed to strike a post-election constitutional amendment based on the ballot title and/or summary.[27] *Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)(stating that there is a deprivation of the right of fair warning results from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language).

The amendment to this statute was proposed in response to the pleadings in *Armstrong* and enacted even prior to the decision being issued. Senate Staff analysis to Senate Bill 2104 available on online at Online Sunshine.

[27] All of the prior cases dealing with clarity in ballot summaries involved pre-election challenges. The *Armstrong* Court relies on its earlier decision in *Wadhams v. Board of County Commissioners*, 567 So.2d 414 (Fla.1990). *Wadhams* was the one case where the court had previously invalidated an election due to clarity problems after the election had occurred. However, the *Wadhams* Court did not create a constitutional accuracy requirement as the *Armstrong* Court did. Rather, *Wadhams* relied totally on the statute. Additionally, *Wadhams* is distinguishable, because it did not involve a ballot summary. Instead, the full text of the proposed amendment to the county charter appeared on the ballot. Ironically, the problem, according to the *Wadhams* Court, was that there was no summary containing an explanatory statement of the current version of the charter. *Wadhams* involved an amendment to a county charter, not a constitutional amendment to the state constitution. It is no response to a claim that a court may not disenfranchise the entire state to say that it has previously disenfranchised an entire county. This is a *non sequitur*. Both violate due process. The only valid response is that the Florida Supreme Court should stop disenfranchising voters. Neither the *Armstrong* nor *Wadhams* Court seems to be aware of the limits on courts invalidating elections.

The Florida Supreme Court's decision in *Armstrong* was arbitrary in violation of due process.

II. THE FLORIDA SUPREME COURT'S INVALIDATION OF A STATE CONSTITUTIONAL AMENDMENT POST VOTER APPROVAL VIOLATES THE FEDERAL CONSTITUTIONAL GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT.

The Florida electorate overwhelmingly approved an amendment to the state constitution restraining the authority of the Florida judiciary and instructing the Florida judiciary that the death penalty was a constitutional method of punishment in Florida. The voters further instructed the Florida judiciary to construe this provision of the state constitution consistent with the Eighth Amendment to the United States Constitution as construed by this Court. The Florida Supreme Court's 4-3 decision nullified the power of the voters to amend their constitution and invalidated 2,676,043 votes was not based upon any judicial power expressed in the state constitution. To the contrary, the decision nullified the unanimous vote of the state legislature's exercise of an express power to propose constitutional amendments. As such, the decision ignored the sovereign authority of the people of the state over an institution of their government and abridged the basic principles of a republican form of government guaranteed to each state under article IV, section 4 of the United States Constitution.

Fundamental to a state's republican form of government is the sovereign authority of the people of a state over their institutions of government. *Duncan v. McCall*, 139 U.S. 449 (1891). This fundamental principle is embodied in article I sec. 1 of the Florida Constitution, "All political power is inherent

in the people." Each state is assured that the federal constitution will protect the right of the people to exert their authority over their institutions of government by the exercise of the right to vote. As the Court in *Duncan* observed with approval:

> ... the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws.

Id. at 461-462. The Court more recently reiterated this point in *Gregory v. Ashcroft*, 501 U.S. 452 (1991)(where the people of Missouri had adopted a constitutional amendment placing restrictions on the state judiciary, regarding mandatory retirement age.) At a minimum, a republican government "is, one constructed on this principle, that the Supreme Power resides in the body of the people." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793) (opinion of Wilson, J.). When one branch of a state government refuses to abide by the will of the voters then the very structure of the government is at issue, and the principles of government guaranteed by article IV, section 4 of the United States Constitution are abridged.

In this case, the Florida judiciary not only refused to accept the adoption of a constitutional amendment by the people of Florida limiting the power of the state judiciary, but also

retroactively changed the rules governing the submission of proposed constitutional amendments more than two years after the election had taken place. The constitutional amendment at issue was adopted to address serious concerns expressed by Justices of the Florida Supreme Court regarding the continuing constitutionality of capital punishment in Florida.[28] In material part, this amendment was adopted specifically to quell the Florida Supreme Court's questioning of the continued viability of capital punishment in this State.[29] In these circumstances, post-election judicial review of the legitimacy of the constitutional amendatory process was conducted by the very court the amendment sought to restrain. In such cases even the propriety of judicial review has been questioned.[30] Judicial nullification of the voters' will without clear and express constitutional authority compels consideration of the impact such judicial overreaching has on the institutions of state

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[28] *See* Pet. App. at 101a-102a (quoting published comments of then-Chief Justice Kogan regarding his views questioning the viability of the death penalty in Florida). The Florida Legislature unanimously proposed this amendment. The proposed amendment was properly noticed in newspapers around the state on two separate occasions. The Florida Constitutional Revision Commission prepared and distributed educational information regarding the proposed amendment. And, the people of Florida overwhelmingly adopted the amendment.

[29] *See, e.g., Jones v. State*, 701 So. 2d 76 (Fla. 1997) (upholding constitutionality of the electric chair on a 4-3 vote with one Justice in the majority urging the legislature to avoid a "constitutional 'train wreck'" by changing the method of execution).

[30] The proposed constitutional amendment at issue in *Coleman v. Miller*, 307 U.S. 433, (1939), would have overruled decisions of this Court. Thus, judicial review of the legitimacy of a state's ratification would have compelled this Court to oversee the very constitutional process used to reverse Supreme Court decisions. In such circumstances it may be entirely appropriate for the judicial branch of government to step aside. *Goldwater v. Carter*, 444 U.S. 996, 1007 fn. 2. (1979) (Powell, J. concurring) (citations omitted).

government under article IV, section 4 of the United States Constitution.[31]

As the Court has recognized, a basic principle of a republican government is the right of the people of a state to exercise sovereign authority over the powers of their institutions of government, including the powers of the judiciary. When a state judiciary subjectively overrules the electorate's exercise of sovereign authority and refuses to accept the people's check on its judicial power, then the principles of republican government guaranteed under article IV, section 4, United States Constitution are abridged. The Court should take this case, instruct the Florida Supreme Court to honor the 2,676,043 votes cast in the general election in 1998, and reverse the decision below.

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[31] Although "the Guarantee Clause has been an infrequent basis for litigation throughout our history," *New York v. United States*, 505 U.S. 144, 184 (1992), not all claims under the Guarantee Clause should be precluded from the jurisdiction of the Court. *See Reynolds v. Sims*, 377 U.S. 533, 582 (1964). This is especially true where the case involves maintaining the integrity of an elector's exercise of the right to vote. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939) (Court equally divided on the issue of its authority to determine whether amendment to U.S. Constitution was properly adopted).

CONCLUSION

The petition for writ of *certiorari* should be granted.

ROBERT A. BUTTERWORTH
Attorney General of Florida

THOMAS E. WARNER
Solicitor General

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CHARMAINE MILLSAPS
Assistant Attorney General

Office of the Attorney General
The Capitol - Suite PL-01
Tallahassee, FL 32399
(850) 414-3681

No. 01-_____

In the

Supreme Court of the United States

Katherine Harris, in her official capacity
as Secretary of State of Florida, et al., *Petitioners*,

v.

The Rev. Dr. James Armstrong, et al., *Respondents*.

On Petition for Writ of Certiorari
to the Florida Supreme Court

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General of Florida

THOMAS E. WARNER
Solicitor General

Carolyn Snurkowski* Assistant Attorney General

Charmaine Millsaps Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol - PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

**Counsel of Record*

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Supreme Court of Florida

No. SC95223

REV. DR. JAMES ARMSTRONG, et al.,
Appellants,

vs.

KATHERINE HARRIS, etc., et al.,
Appellees.

[September 7, 2000]

SHAW, J.

We have on appeal a judgment certified by the district court to be of great public importance requiring immediate resolution by this Court. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

I. FACTS

The Florida Legislature filed with the Florida Secretary of State ("Secretary") a joint resolution (No. 3505) of the House of Representatives of the Florida Legislature proposing an amendment to article I, section 17, Florida Constitution, relating to excessive punishments (May 5, 1998). The proposed amendment was designated Amendment No. 2. Dr. Armstrong and other citizens filed a petition for writ of mandamus in this Court challenging the validity of the proposed amendment (October 9), but the Court by a four-to-three vote declined to exercise jurisdiction "without prejudice to Armstrong to file an appropriate action in circuit court"

(October 19).[1] Armstrong then filed a complaint in circuit court seeking mandamus, injunctive, and declaratory relief (October 20), and the court ruled thusly: It dismissed the claim for mandamus relief, denied injunctive relief, and withheld ruling on the claim for declaratory relief (October 26). Armstrong sought certiorari review in the district court (October 26); that court certified the issue to this Court (October 28). On the day preceding the general election, this Court unanimously dismissed the appeal for technical reasons, without prejudice (November 2).[2] Voters at the general election approved the amendment (November 3).

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[1] This Court's order stated in full: "We decline to exercise jurisdiction without prejudice to file an appropriate action in the circuit court." Armstrong v. Mortham, 727 So. 2d 902 (Fla. 1998) (unpublished order).

[2] This Court's order stated in full:

> The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, by order dated October 26, 1998, dismissed appellants' claim for mandamus relief, denied injunctive relief, and withheld ruling on the claim for declaratory relief. A petition for writ of certiorari from the dismissal of the claim for mandamus relief was filed with the district court and treated as an appeal. By order dated October 28, 1998, the First District Court of Appeal certified to this Court the denial of injunctive relief as an issue of great public importance requiring immediate resolution. On October 27, 1998, the appellants voluntarily dismissed their counts for injunctive and declaratory relief.
>
> Under the circumstances, we dismiss this appeal without prejudice.
>
> No motion for rehearing will be entertained by the Court.

Armstrong v. Mortham, 719 So. 2d. 892 (Fla. 1998) (unpublished order).

Armstrong filed a motion in this Court asking the Court to remand the case to the district court (November 11). He then filed in circuit court the present amended petition claiming that the ballot title and summary are inaccurate and again seeking mandamus, injunctive, and declaratory relief (December 3). The Secretary filed an answer in circuit court conceding that this claim is justiciable in an action for injunctive or declaratory relief[3] but asserting that the ballot title and summary are accurate (December 28). Armstrong sought summary judgment, contending that the ballot title and summary are misleading as a matter of law (January 4, 1999). The Secretary filed a cross-motion for summary judgment, arguing that the ballot title and summary are adequate (January 27). The circuit court's authority to decide the matter was not challenged or raised as an issue. This Court then issued an order formally remanding the case to the circuit court, without prejudice, to resolve the pending issues (February 2, 1999).[4] The circuit court reviewed the respective arguments in the summary judgment motions and granted summary judgment in favor of the Secretary, concluding that the Secretary's legal argument was more persuasive (February 25).[5] Armstrong appealed

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[3] The Secretary averred the following in her Answer: She "[d]enied this [Circuit] Court has jurisdiction to issue a writ of mandamus under the circumstances at bar"; and she "[a]dmitted" that the court has authority to issue injunctive and declaratory relief in the case at bar.

[4] This Court's order stated in full: "We remand this case, without prejudice, to the Second Judicial Circuit for resolution of all issues that are pending in that court." Armstrong v. Mortham, No. 94,205 (Fla. order filed Feb. 2, 1999).

[5] The order stated in relevant part: "Suffice it to say that I find the argument advanced by the [the Secretary] to be more persuasive on each point and accordingly, it is ORDERED AND ADJUDGED that [Armstrong's] Motion for Summary Judgment is denied. [Armstrong's] Cross Motion for Summary Judgment is granted and Final Summary

(March 15). The district court certified the case to this Court via "pass through" jurisdiction (March 31).[6]

Armstrong contends that both the ballot title and summary to Amendment No. 2 are defective for several reasons: They fail to disclose that the current prohibition against "cruel or unusual punishment" would be changed to "cruel and unusual punishment"; they give the false impression that the death penalty is in danger of being abolished and needs to be "preserved"; and they fail to give notice that the amendment would alter the separation of powers between the branches of government by giving the Legislature unfettered discretion to establish both the method of execution and the crimes susceptible to the death penalty.

II. STANDING

In her answer brief before this Court, the Secretary argued–as she did below–that the ballot title and summary are accurate. She never argued or suggested that Armstrong lacks standing to pursue this action. Following oral argument before this Court, the Secretary submitted a supplemental brief[7] in which she now contends that Armstrong cannot pursue this appeal because the general election already has taken place, the

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Judgment is hereby entered in favor of [the Secretary]."

[6] See Art. V., § 3(b)(5), Fla. Const. (stating that the Supreme Court "[m]ay review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court").

[7] The brief was submitted by the Florida Solicitor General on behalf of the Secretary and others.

voters have approved the amendment, and Armstrong's action was dilatory. We disagree.

Article XI, section 5, Florida Constitution, contains a pre-election notice requirement which provides that a proposed constitutional amendment must be published in newspapers of general circulation throughout the state at both ten and six weeks prior to the election.[8] The purpose of this requirement is to avoid a "November surprise" in which voters are taken unawares in the voting booth by a proposed amendment. If citizens are given adequate pre-election notice, those who object to the substance of an amendment can voice their views in the public forum, and those who object to the regularity of the ballot title and summary can challenge the amendment in court.

Assuming that Armstrong received constructive notice of the present amendment in conformity with article XI, section 5, his failure to file the initial petition until several weeks later (i.e., three and a half weeks before the election) does not appear dilatory. Nothing in the record reveals that, prior to obtaining constructive notice, Armstrong, et al., constituted a formal political apparatus or an established special interest group with clear pre-publication knowledge of the amendment. Rather, appellants appear to be an ad hoc group of concerned citizens who, upon receiving notice, required a reasonable period of

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[8] Article XI, section 5, Florida Constitution, provides in relevant part:

> (b) Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published.

time in which to exercise their electoral prerogative–i.e., to meet and discuss the matter; to organize; to chart a course of action; to fund their organization, if necessary; to employ counsel; to research the issues, and to file suit. Given the pre-election publication schedule set forth in article XI, section 5, appellants filed their petition within a reasonable time after receiving constructive notice of the proposed amendment.

III. THE ACCURACY REQUIREMENT

A court may declare a proposed constitutional amendment invalid only if the record shows that the proposal is clearly and conclusively defective;[9] the standard of review for a pure question of law is de novo.[10] Proposed amendments to the Florida Constitution may originate in any of several sources, including the Legislature,[11] revision commission,[12] citizen

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[9] Askew v. Firestone, 421 So. 2d 151, 154 (Fla. 1982).

[10] See, e.g., id. at 156 (applying a de novo standard of review to the trial court's order: "Nevertheless, it is clear and convincing to us that the ballot language . . . is so misleading to the public . . . that this remedial action must be taken."); see also Philip J. Padovano, Florida Appellate Practice 148 (2nd ed. 1997) ("Summary judgments present a classic example of the type of decisions that are subject to the de novo standard of review.").

[11] Article XI, section 1, Florida Constitution, provides:

> Section 1. Proposal by legislature.-- Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

[12] Art. XI, § 2, Fla. Const.

initiative,[13] or constitutional convention.[14] Regardless of source, a proposed amendment ultimately must be submitted to the electors for approval at the next general election. Article XI, section 5, Florida Constitution, states:

> SECTION 5. Amendment or revision election.--
>
> (a) A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution, initiative petition or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records, unless, pursuant to law enacted by the affirmative vote of three-fourth of the membership of each house of the legislature and limited to a single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.

Art. XI, § 5, Fla. Const. (emphasis added). Implicit in this provision is the requirement that the proposed amendment be accurately represented on the ballot; otherwise, voter approval would be a nullity.[15]

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[13] Art. XI, § 3, Fla. Const.

[14] Art. XI, § 4, Fla. Const.

[15] See generally Askew, 421 So. 2d at 155 ("[T]he Constitution requires . . . that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." (quoting Hill v. Milander, 72 So. 2d 796,

This accuracy requirement, which applies to all proposed constitutional amendments, has been codified by the Legislature in chapter 101, Florida Statutes (1997). Because the text of a proposed amendment oftentimes is detailed and lengthy, section 101.161 provides that only a title and brief summary of the amendment's "chief purpose" may be listed on the ballot. The actual text of the amendment does not appear:

> 101.161 Referenda; ballots.--
>
> (1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be

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798 (Fla. 1954) (emphasis added)); Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976) ("[L]awmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be."); Crawford v. Gilchrist, 64 Fla. 41, 54, 59 So. 963, 968 (1912) (noting that the "proposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation"); see also James Bacchus, Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith, 5 Fla. St. U. L. Rev. 747(1977) (decrying the lack of adequate judicial control over legislatively proposed amendments and calling for adoption of an explicit accuracy requirement in article XI, section 1).

> embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

§ 101.161(1), Fla. Stat. (1997) (emphasis added). Significantly, both the ballot title and summary are prepared by the amendment's sponsor.[16]

Because voters will not have the actual text of the amendment before them in the voting booth when they enter their votes, the accuracy requirement is of paramount importance for the ballot title and summary:

> As previously stated, section 101.161 requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure. The requirement for proposed constitutional amendment ballots is the same as for all ballots, i.e.,
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> > that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his

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[16] See § 101.161(2), Fla. Stat. (1997).

> vote. . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.

Askew v. Firestone, 421 So. 2d 151, 154-55 (Fla. 1982) (emphasis added). In practice, the accuracy requirement in article XI, section 5, functions as a kind of "truth in packaging" law for the ballot.

IV. LEGISLATIVELY PROPOSED AMENDMENTS

The Secretary in her supplemental brief argues that the Court should adopt a special standard for evaluating the validity of constitutional amendments proposed by the Legislature. She does not contend that all legislatively proposed amendments are automatically exempt from the accuracy requirement or that the courts have no authority to review such amendments. Rather, she claims that the accuracy requirement is applicable to legislatively proposed amendments only if a party can show conclusively that the Legislature engaged in fraud, deceit, or trickery.[17] We disagree.

Article XI, section 1, Florida Constitution, sets forth the

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[17] The Secretary argues: "Absent a conclusive demonstration that the manner in which the Legislature has prepared a ballot title and summary in a joint resolution demonstrates fraud, deceit or trickery in violation of the federal constitution or the fundamental constitutional political rights of the electorate, the courts must defer to the Legislature's determination that its ballot title and summary is valid."

procedure for amending the constitution via legislative resolution:

> Section 1. Proposal by legislature.--Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

Art. XI, § 1, Fla. Const.

Although the constitution does not expressly authorize judicial review of amendments proposed by the Legislature,[18] this Court long ago explained that the courts are the proper forum in which to litigate the validity of such amendments:

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[18] The constitution expressly authorizes judicial review of only those amendments proposed by citizen initiative. See Art. IV, § 10, Fla. Const.; see generally Art. V, § 3(10), Fla. Const; Art XI, § 3, Fla. Const. (explaining that the sponsor of an initiative petition must obtain signatures of eight percent of electors statewide in order to place the amendment on the ballot); §§ 15.21 (explaining that judicial review may be sought when the sponsor has obtained one-tenth of the signatures necessary for placement on the ballot), 16.061, Fla. Stat. (1997). This provision was adopted in 1986 in response to the Court's striking of two initiative amendments from the ballot after the sponsors had obtained the requisite number of signatures for placement on the ballot. See Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984); Fine v. Firestone, 448 So. 2d 984 (Fla. 1984). The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. See William A. Buzzett & Deborah K. Kearney, Commentary (1986 House Joint Resolution 71), 26 Fla. Stat. Ann., Art. IV, § 10, Fla. Const. (West Supp. 2000). Obviously, no such provision is necessary for amendments originating from other sources.

> Under our system of constitutional government regulated by law, a determination of whether an amendment to the Constitution has been validly proposed and agreed to by the Legislature depends upon the fact of substantial compliance or noncompliance with the mandatory provisions of the existing Constitution as to how such amendments shall be proposed and agreed to, and such determination is necessarily required to be in a judicial forum where the Constitution provides no other means of authoritatively determining such questions.

Crawford v. Gilchrist, 64 Fla. 41, 50, 59 So. 963, 966 (1912) (emphasis added). This Court has reviewed legislatively proposed amendments throughout this century, and we have evaluated amendments' validity on various grounds, including ballot accuracy.[19]

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[19] See, e.g., Grose v. Firestone, 422 So. 2d 303 (Fla. 1982) (finding no violation of the accuracy requirement in a legislatively proposed amendment requiring courts to interpret the Florida Unreasonable Searches and Seizures Clause in conformity with its federal counterpart); Askew v. Firestone, 421 So. 2d 151 (Fla. 1982) (finding a violation of the accuracy requirement in a legislatively proposed amendment ending an absolute two-year ban on lobbying by former legislators); Smathers v. Smith, 338 So. 2d 825 (Fla. 1976) (finding no violation of either the "germaneness" doctrine or the accuracy requirement in a legislatively proposed amendment giving the Legislature the power to nullify administrative rules); Rivera-Cruz v. Gray, 104 So. 2d 501 (Fla. 1958) (finding that a legislatively proposed amendment revising the Preamble and every article in the constitution violated the then-current provision that limited an amendment to a single article); Gray v. Golden, 89 So. 2d 785 (Fla. 1956) (finding that a legislatively proposed amendment authorizing home rule for Dade County did not violate the single-article provision); Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892 (1944) (finding no violation of the accuracy requirement in a legislatively proposed amendment creating the Game and Fresh Water Fish Commission); Collier v. Gray, 116 Fla. 845, 157 So. 40 (1934) (finding that

In conducting this review, we traditionally have accorded a measure of deference to the Legislature:

> Another thing we should keep in mind is that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution. The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.

Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956). This deference, however, is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature.[20]

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a legislatively proposed amendment delineating judicial circuits throughout the state could be voted upon by electors despite "a clerical misprision" in copying the resolution in the House journal); Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912) (finding that a legislatively proposed amendment was invalid because it was not signed by the presiding officer of the House or Senate and was never intended to function as an amendment).

[20] See, e.g., Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976) ("With these minimal requirements for clear expression and locational specificity

Several modern cases involving legislatively proposed amendments illustrate the applicability of the accuracy requirement in article XI, section 5. The Court in Smathers v. Smith, 338 So. 2d 825 (Fla. 1976), reviewed a proposed amendment that gave the Legislature the power to nullify any administrative rule of any executive agency. Preliminarily, the Court noted the need for accuracy:

> [L]awmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.

Smathers, 338 So. 2d at 829.[21] Recognizing the deference due legislative acts in general, the Court evaluated the amendment under an implicit "germaneness" theory and approved it, concluding that the proposed amendment was minimally germane to the provision it amended. The Court further ruled that the amendment comported with the requirements of section 101.161 and was not misleading.[22]

In Grose v. Firestone, 422 So. 2d 303 (Fla. 1982), the Court reviewed a legislatively proposed amendment that

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in mind, we turn to the proposal before us.").

[21] See also Smathers, 338 So. 2d at 828 (referring to "the even more compelling notice-giving needs which legislators should have for constitutional amendments").

[22] See Smathers, 338 So. 2d at 827 n.2 ("We have considered all of the points raised by Smith [including his accuracy claim under section 101.161] and find that . . . they are without merit . . . . ").

required courts to construe the Unreasonable Searches and Seizures Clause in the Florida Constitution in conformity with its federal counterpart. Again, the Court stressed the need for accuracy:

> What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.

Grose, 422 So. 2d at 305 (quoting Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954)) (emphasis omitted). The Court then conducted an analysis under section 101.161 and approved the amendment, concluding that "[t]he wording of the ballot summary of proposed Amendment 2 is unambiguous and clearly states the amendment's chief purpose."[23]

And finally, the Court in Askew v. Firestone, 421 So. 2d 151 (Fla. 1982), reviewed a legislatively proposed amendment that banned former legislators from lobbying for a two-year period after leaving office unless the legislator made full disclosure of his or her financial interests.[24] Again, the Court

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[23] Grose, 422 So. 2d at 305.

[24] The ballot title and summary read as follows:

> FINANCIAL DISCLOSURE REQUIRED BEFORE LOBBYING BY FORMER LEGISLATORS AND STATEWIDE ELECTED OFFICERS
>
> Prohibits former legislators and statewide elected officers from representing other persons or entities for compensation before any state government body for a period of 2 years following vacation of office, unless they file full and public disclosure of their financial interests.

noted the need for accuracy on the ballot:

> Simply put, the ballot must give the voter fair notice of the decision he must make.

Askew, 421 So. 2d at 155. Although the ballot summary faithfully tracked the text of the proposed amendment, the summary failed to explain that the amendment would supersede an already existing constitutional provision that imposed an absolute two-year ban on lobbying by former legislators (i.e., regardless of financial disclosure). The Court concluded that the summary was misleading because it failed to tell voters that the amendment was intended to end the existing ban:

> The problem . . . lies not with what the summary says, but, rather, with what it does not say.
>
> . . . .
>
> If the legislature feels that the present prohibition against appearing before one's former colleagues is wrong, it is appropriate for that body to pass a joint resolution and to ask the citizens to modify that prohibition. But such a change must stand on its own merits and not be disguised as something else. The purpose of section 101.161 is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment. A proposed amendment cannot fly under false colors; this one does. The burden of informing the public should not fall only on the press and opponents of the measure--the ballot title and summary must do this.

Askew, 421 So. 2d at 156 (emphasis added). The Court struck

Askew, 421 So. 2d at 153.

the proposed amendment because it was misleading.

As these cases illustrate, the gist of the constitutional accuracy requirement is simple: A ballot title and summary cannot either "fly under false colors" or "hide the ball" as to the amendment's true effect. The applicability of this requirement also is simple: It applies across-the-board to all constitutional amendments, including those proposed by the Legislature.

V. THE PRESENT CASE

Pursuant to Florida's statutory scheme, the text of the proposed amendment in the present case did not appear on the ballot[25]; only the following language appeared:

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[25] The full text of the proposed amendment as it appears in Joint Resolution No. 3505 reads as follows:

> FULL TEXT OF PROPOSED AMENDMENT:
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> SECTION 17. Excessive punishments.--Excessive fines, cruel and ~~or~~ unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the Legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is

NO. 2
CONSTITUTIONAL AMENDMENT
ARTICLE 1, SECTION 17
(Legislative)

BALLOT TITLE: PRESERVATION OF THE DEATH PENALTY; UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT

BALLOT SUMMARY: Proposing an amendment to Section 17 of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.

Supervisor of Elections, Leon County, Fla., "Official Sample Ballot, 1998 General Election" 4 (Nov. 3, 1998). This ballot title and summary are deficient under article XI, section 5, for several reasons.

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invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

H.J.Res. 3505, Regular Session (Fla. 1998) (words stricken are deletions; words underlined are additions).

A. "Flying Under False Colors"

The ballot title and summary are misleading because the latter portion of the title ("UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT") and the second sentence in the summary ("Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment.") imply that the amendment will promote the rights of Florida citizens through the rulings of the United States Supreme Court.

Florida's Cruel or Unusual Punishment Clause was adopted in 1838 by the Founding Fathers at the first constitutional convention in Port St. Joe and provided as follows:

> That the great and essential principles of liberty and free government, may be recognized and established, we declare:
>
> . . . .
>
> 12. That excessive bail shall in no case be required; nor shall excessive fines be imposed; nor shall cruel or unusual punishments be inflicted.

Art. 1, § 12, Fla. Const. of 1838 (emphasis added). The Clause has remained an integral part of our state constitution ever since and today provides:

> Excessive punishments.--Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Art. 1, § 17, Fla. Const. Use of the word "or" instead of "and" in the Clause indicates that the framers intended that both alternatives (i.e., "cruel" and "unusual") were to be embraced individually and disjunctively within the Clause's proscription.[26]

This Court in Traylor v. State, 596 So. 2d 957 (Fla. 1992), explained that our system of constitutional government in Florida is grounded on a principle of "robust individualism" and that our state constitutional rights thus provide greater freedom from government intrusion into the lives of citizens than do their federal counterparts:

> Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation.

Id. at 962. In short: "[T]he federal Constitution . . . represents the floor for basic freedoms; the state constitution, the ceiling." Id.

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[26] See, e.g., Allen v. State, 636 So. 2d 494, 497 n.5 (Fla. 1994) ("Unlike the federal Constitution, the Florida Constitution prohibits 'cruel or unusual punishment.'. . . This means that alternatives were intended."); Tillman v. State, 591 So. 2d 167, 169 n.7 (Fla. 1991) ("The use of the word 'or' indicates that alternatives were intended.").

In the present case, by changing the wording of the Cruel or Unusual Punishment Clause to become "Cruel and Unusual" and by requiring that our state Clause be interpreted in conformity with its federal counterpart, the proposed amendment effectively strikes the state Clause from the constitutional scheme. Under such a scenario, the organic law governing either cruel or unusual punishments in Florida would consist of a floor (i.e., the federal constitution) and nothing more. The Court in Traylor addressed precisely this scenario:

> Under the federalist principles expressed above, where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election. Cf. People Against Tax Revenue Mismanagement v. County of Leon, 583 So. 2d 1373, 1376 (Fla. 1991) ("This is especially true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.").

Traylor at 962-63 n.5 (emphasis added). In the present case, a citizen could well have voted in favor of the proposed amendment thinking that he or she was protecting state constitutional rights when in fact the citizen was doing the exact opposite–i.e., he or she was voting to nullify those rights.[27]

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[27] The Secretary points out that the Court in Grose v. Firestone, 422 So. 2d 303 (Fla. 1982) (addressing an amendment to the state Unreasonable Searches and Seizures Clause), upheld the ballot summary in another "conformity amendment" case. At that time, however, the conformity issue was one of first impression and the Court was asked to rule on short notice (i.e., the case was submitted to the Court less than a week before the general election) without extensive briefing by the parties. In the years

B. "Hiding The Ball"

To conform to section 101.161(1), a ballot summary must state "the chief purpose" of the proposed amendment.[28] In evaluating an amendment's chief purpose, a court must look not to subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself, such as the amendment's main effect.[29] In the present case, as explained above, the main effect of the amendment is simple, clear-cut, and beyond dispute: The amendment will nullify the Cruel or Unusual Punishment Clause. This effect far outstrips the stated purpose (i.e., to "preserve" the death penalty), for the amendment will nullify a longstanding constitutional provision that applies to all criminal punishments, not just the death penalty. Nowhere in the summary, however, is this effect mentioned–or even hinted at. The main effect of the amendment is not stated anywhere on the ballot. (The voter is not even told on the ballot that the word "or" in the Cruel or Unusual Punishment Clause will be changed to "and"[30]--a

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following Grose, the issue has been widely debated and has been the focus of intensive and spirited discourse. See, e.g., Perez v. State, 620 So. 2d 1256 (Fla. 1993); Bernie v. State, 524 So. 2d 988 (Fla. 1988).

[28] See § 101.161(1), Fla. Stat. (1997) ("The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.") (emphasis added).

[29] See, e.g., Evans v. Firestone, 457 So. 2d 1351, 1355 (Fla. 1984) ("The ballot summary should tell the voter the legal effect of the amendment . . . .") (emphasis added); Askew, 421 So. 2d at 156 ("The purpose of section 101.161 is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment.") (emphasis added).

[30] The ballot summary simply states: "Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment." (Emphasis

significant change by itself.)

VI. POST-ELECTION INVALIDATION

The Secretary in her supplemental brief claims that Armstrong cannot proceed with this suit because the election already has taken place and voters have approved the amendment. The favorable vote of the electors, she contends, cleansed the amendment of any defect. We disagree.

Where a proposed constitutional amendment contains a defect in form, a vote of approval by the electorate may in some cases cleanse the amendment of the defect. This Court in Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892 (1944), stated the general rule:

> [O]nce an amendment is duly proposed and is actually published and submitted to a vote of the people and by them adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, the effect of a favorable vote by the people is to cure defects in the form of the submission.

Sylvester, 154 Fla. at 669, 18 So. 2d at 895.[31] This rule,

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added.)

[31] See also State ex rel. Landis v. Thompson, 120 Fla. 860, 874-75, 163 So. 270, 276 (1935) ("[I]n ruling upon the validity of constitutional changes after the popular voice has been expressed in favorably voting upon such changes proposed in the form of constitutional amendments agreed to by the Legislature, the popular voice is the paramount act, and . . . mere formal or procedural irregularities in the framing, manner, or form of submission or balloting, will not be held fatal to the validity of such amendment after it has been actually agreed to by three-fifths vote of all the members elected

however, is subject to a caveat: The defect in form must be technical and minor, which was the case in Sylvester:

> [W]e are satisfied that if there was any irregularity in the form of the ballot with reference to the amendment now before us, it was not a serious one and was cured by the adoption of the amendment by the people at the General Election in November, 1942.

Sylvester, 154 Fla. at 669, 18 So. 2d at 896 (emphasis added). Where the defect goes to the heart of the amendment, on the other hand, the flaw may be fatal.

In Wadhams v. Board of County Commissioners, 567 So. 2d 414 (Fla. 1990), the Board of County Commissioners of Sarasota County (the "Commissioners") sought to amend a provision of the county charter governing the Charter Review Board (the "Board"), which is charged with reviewing the charter on a regular basis and recommending changes directly to the people. The text of the proposed amendment was printed in full on the ballot and provided inter alia that the Board would meet every four years.[32] The Commissioners, however,

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to each House, and such amendment thereafter duly published submitted to and affirmatively approved by a majority vote of the electors cast thereon."). Cf. Collier v. Gray, 116 Fla. 845, 858, 157 So. 40, 45 (1934) ("The substance more than the form is to be regarded in considering whether the complete system prescribed by . . . the Constitution for submitting proposals to amend the Constitution has been observed.").

[32] The ballot entry as reprinted in Wadhams read as follows:

OFFICIAL BALLOT
SPECIAL ELECTION ON AMENDING ARTICLE II
SECTIONS 2.11.A AND 2.11.B OF THE
SARASOTA COUNTY CHARTER

neglected to mention on the ballot that the amendment would

NOVEMBER 6, 1984

Shall Article II, Sections 2.11.A and 2.11.B of the Sarasota County Charter be amended as proposed by Sarasota county Ordinance No. 84-72 to read:

"Section 2.11.A Composition, Election and Term of Members. There shall be a Charter Review Board which shall by 1984 be composed of ten (10) members who shall serve without compensation and who shall be elected in the following manner: five (5) members, one residing in each of the five County Commission districts, shall be elected by the voters of Sarasota County at the general election to be held in 1982, and every four (4) years thereafter; five (5) members, one residing in each of the five County Commission districts, shall be elected by the voters of Sarasota County at the general election to be held in 1984, and every four (4) year thereafter. Members shall take office on the second Tuesday following the general election."

"Section 2.11.B Purpose, Jurisdiction and Meetings of Review Board. The Charter Review board shall hold meetings to organize, elect officers, and conduct business only during the year, and prior to that time, in which a general election is held in 1988, and each four (4) years thereafter. The Review Board shall review the operation of the County government, on behalf of the citizens and recommend changes for improvement of this Charter. Such recommendations shall be subject to referendum in accordance with the provisions of Section 6 herein. An affirmative vote of two-thirds [] of the members elected or appointed to the Review Board shall be required to recommend amendments for referendum. The Board of County Commissioners shall pay reasonable expenses of the charter review Board."

YES (Punch Card Number) NO (Punch Card Number)

Wadhams, 567 So. 2d at 415.

supersede an existing charter provision that allowed the Board to conduct unlimited meetings–i.e., the proposal was intended to curtail the Board's right to meet. The proposal was approved by electors at a special election, and a group of citizens subsequently challenged the amendment's validity.

Both the trial and district courts approved the amendment; this Court quashed the district court decision. The Court flatly rejected the Commissioners' argument that even though the ballot did not explain the amendment's chief purpose, that information had been sufficiently disseminated via public hearings, pre-election publication, and other means:

> The [Commissioners argue] that the majority in the decision below correctly concluded that there was no reason to invalidate the amendment[] based on voter confusion because the voters were afforded ample opportunity to become informed on the issue before the election by public hearings, advance publication of the proposal, and media publicity. We reject this argument. As this Court stated in Askew, "[t]he burden of informing the public should not fall only on the press and opponents of the measure–the ballot . . . summary must do this."

Wadhams, 567 So. 2d at 417 (emphasis omitted).[33] The Court also rejected the Commissioners' argument that the voters'

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[33] See also James Bacchus, Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith, 5 Fla. St. U. L. Rev. 747, 802 (1977) ("It is hardly necessary to document the conclusion that a constitution which relies exclusively on legislative journals and legal advertisements to publicize proposed constitutional amendments guarantees little in the way of actual notice to a vast majority of the electorate.").

approval of the amendment cleansed it of any defect:

> We also reject the [Commissioners'] argument that the favorable vote cured any defects in the form of the submission. This defect was more than form; it went to the very heart of what section 101.161(1) seeks to preclude. Moreover, it is untenable to state that the defect was cured because a majority of the voters voted in the affirmative on the proposed amendment when the defect is that the ballot did not adequately inform the electorate of the purpose and effect of the measure upon which they were casting their votes. No one can say with any certainty what the vote of the electorate would have been if the voting public had been given the whole truth, as mandated by the statute, and had been told " the chief purpose of the measure."

Wadhams, 567 So. 2d at 417 (emphasis added).

And finally, the Court rejected the Commissioners' contention that the challenge should be rejected because it was filed too late:

> Finally, we reject the [Commissioners'] argument that the present case is distinguishable from Askew because Askew dealt with a preelection challenge to the ballot and that the petitioners should be foreclosed from relief because the present action was not instituted until after the special election. The [Commissioners] in effect argue[] that hoodwinking the voting public is permissible unless the action is

> challenged prior to the election. We perceive no basis for the [Commissioners'] conclusion that the holding of this Court in Askew applies only if the challenge is made prior to the election. We agree with the dissent below that although there would come a point where laches would preclude an attack on the ordinance, such is not the situation in the present case where the suit was filed only a few weeks after the election.
>
> Deception of the voting public is intolerable and should not be countenanced. The purpose of section 101.161(1) is to assure that the electorate is advised of the meaning and ramifications of the proposed amendment. Because the ballot at issue failed to comply with . . . section 101.161(1), the proposed amendments must be stricken.

Wadhams, 567 So. 2d at 417-18 (emphasis added).

Like the ballot language in Wadhams, the ballot language in the present case is defective for what it does not say: It does not tell voters the "chief purpose" of the amendment. The present case, however, is even more compelling than Wadhams for several additional reasons. First, unlike the situation in Wadhams, the challenge here was initiated nearly a month before the election took place, rather than after the election. Second, unlike the situation in Wadhams, the text of the present amendment did not appear on the ballot, and the title and summary–which did appear–were misleading because they implied that the amendment would promote the rights of

Florida citizens[34] and they contained several factual inaccuracies.[35]

Accordingly, we reaffirm our holding in Wadhams that a favorable popular vote standing alone does not confer automatic validity on a defective amendment. When a defect goes to the very heart of the amendment, as it did in both Wadhams and the present case, it is impossible to say with any certainty what the vote of the electorate would have been "if the voting public had been given the whole truth." Wadhams, 567 So. 2d at 417. In such a case, the popular vote was based not on the whole truth but on part-truth.

VII. CONCLUSION

Although this Court traditionally has accorded a measure of deference to constitutional amendments proposed by the Legislature, our discretion is limited by the constitution itself. The accuracy requirement in article XI, section 5, imposes a strict minimum standard for ballot clarity. This requirement plays no favorites–it applies across-the-board to all constitutional amendments, including those proposed by the Legislature. The purpose of this requirement is above reproach–it is to ensure that each voter will cast a ballot based on the full truth. To function effectively–and to remain

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[34] As noted above, the ballot title and summary indicated that the amendment would foster the rights of Florida citizens through the rulings of the United States Supreme Court.

[35] As noted above, the ballot title and summary claim to "preserve" the death penalty, when the text in fact "authorizes" it. Also, the summary refers to the prohibition against "cruel and/or unusual" punishment, when in fact no such phrase is mentioned in the text. Finally, the ballot title and summary do not mention the fact that the amendment would change the word "or" in the phrase "cruel or unusual" to the word "and."

viable–a constitutional democracy must require no less.

Amendment No. 2 fails under article XI, section 5, for several reasons. First, the amendment "flies under false colors." Citizens may well have voted in favor of the amendment based on the false premise that the amendment will promote the basic rights of Florida citizens. Under such circumstances, the true merits of the amendment will have been overlooked or misconstrued. Second, the proposed amendment "hides the ball" from the voter. The ballot title and summary give no hint of the radical change in state constitutional law that the text actually foments.

It is beyond dispute that the amendment's main effect is to nullify a fundamental state right that has existed in the Declaration of Rights since this state's birth over a century and a half ago. This Court long ago noted the venerable role the Declaration of Rights (i.e., article I, sections 1-25, Florida Constitution) plays in our tripartite system of government in Florida:

> It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights . . . have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of

> personal liberty and private property, "Thus far shalt thou come, but no farther." They constitute a limitation upon the powers of each and all the departments of the state government. Thus no department, not even the legislative, has unlimited power under our system of government.

State ex rel. Davis v. City of Stuart, 97 Fla. 69, 102-03, 120 So. 335, 347 (1929). Courts must attend with special vigilance whenever the Declaration of Rights is in issue.[36]

Under our constitutional form of government in Florida, the Legislature is authorized to enact statutory laws and the courts can define the common law, but only the people–by direct vote–can delineate the organic law. The constitution is the one abiding voice of the body politic and encompasses the collective wisdom and counsel of our forebears, recorded verbatim throughout the ages. While any successive legislature is free to question the wisdom of the Founding Fathers and propose the striking of the Cruel or Unusual Punishment Clause, the Due Process Clause, the Right to Bear Arms Clause, the Freedom of Speech Clause, the Freedom of Religion Clause, or any other basic right enumerated in the Declaration of Rights, that legislature must do so plainly, in clear and certain terms. When Florida citizens are being called upon to nullify an original act of the Founding Fathers, each citizen is entitled–indeed, each is duty-bound–to cast a ballot with eyes wide open.

Based on the foregoing, we hold that proposed Amendment

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[36] See, e.g., Traylor, 596 So. 2d at 963 ("Special vigilance is required where the fundamental rights of Florida citizens . . . are concerned . . . .").

No. 2 clearly and conclusively violates the accuracy requirement in article XI, section 5, Florida Constitution. The ballot title and summary "fly under false colors" and "hide the ball" as to the amendment's true effect. Most important, voters were not told on the ballot that the amendment will nullify the Cruel or Unusual Punishment Clause, an integral part of the Declaration of Rights since our state's birth. Voters thus were not permitted to cast a ballot with eyes wide open on this issue. Because the validity of the electoral process was fundamentally compromised, we conclude that proposed Amendment No. 2 must be stricken.

It is so ordered.

HARDING, ANSTEAD and PARIENTE, JJ., concur.

HARDING, J, concurs specially with an opinion, in which PARIENTE, J., concurs.

PARIENTE, J., concurs specially with an opinion.
WELLS, C.J., dissents with an opinion.

LEWIS, J., dissents with an opinion.

QUINCE, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

HARDING, J., specially concurring.

I agree with the majority's conclusion that proposed Amendment No. 2 must be stricken because the ballot title and summary are inaccurate and misleading.

Article XI, section 5 of the Florida Constitution sets forth the procedures for submitting a proposed constitutional amendment to the electors for a vote. This section provides when a proposed amendment or revision to the constitution must be submitted to the voters,[37] the method for providing public notice of the proposed amendment or revision,[38] and when an approved amendment or revision becomes effective.[39] However, this section contains no explicit requirements as to the language or wording of a proposed amendment. I agree with the majority that the constitutional requirement that a proposed amendment be submitted to the electors for approval contains an implicit requirement that the proposed amendment be accurately represented on the ballot; otherwise voter approval would be a nullity.

I reach this conclusion for two reasons: (1) the legislative intent expressed in section 101.161, Florida Statutes (1999), that the language of constitutional amendments and other public measures submitted to the vote of the people be clear and unambiguous; and (2) the long history of judicial review of ballots for clarity and lack of ambiguity.

In 1980, the Legislature amended section 101.161 to require that the substance of a constitutional amendment or other public measure submitted to the vote of the people be printed on the ballot in "clear and unambiguous language." See ch. 80-305, § 2, at 1342, Laws of Fla. Section 101.161 relates to "Referenda; ballots" and is contained in chapter 101, which governs "Voting Methods and Procedures." As amended by

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[37] Art. XI, § 5(a), Fla. Const.

[38] Id. § 5(b).

[39] Id. § 5(c).

the legislature, section 101.161(1) provides that "[w]henever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language." (Emphasis added.) Nothing in subsection 1 limits this requirement to citizen-initiated amendments. In contrast, subsection 2 specifically pertains to "[t]he substance and ballot title of a constitutional amendment proposed by initiative." Id. Thus, I conclude that the standards of accuracy and clarity apply with equal force to all constitutional amendments and other public ballot measures, whatever the method by which they are initiated. I believe that section 101.161 was simply a codification of the implicit authority of Florida courts to review ballot measures for accuracy and clarity and a legislative statement that such clarity and accuracy is especially important when the voters are being asked to change the basic legal framework of the state. "Nothing in the government of this state or nation is more important than amending our state and federal constitutions. The law requires that before voting a citizen must be able to learn from the proposed question and explanation what the anticipated results will be." Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982) (Boyd, J., specially concurring).

However, long before the Legislature applied this requirement to constitutional amendment ballots, this Court held that all ballots must meet certain accuracy requirements. See Hill v. Milander, 72 So. 2d 796 (Fla. 1954) (addressing validity of ballot in city election). As this Court explained:

> [T]he voter should not be misled and [should] have an opportunity to know and be on notice as to the proposition on which he is to cast his vote. . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that

> which he must decide. . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.

Id. at 798 (emphasis added); accord Askew v. Firestone, 421 So. 2d at 155 (applying same criteria to ballot containing legislatively proposed constitutional amendment). As explained in Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976), this Court has historically reviewed proposed amendments to ensure that they meet "minimal requirements for clear expression." The Court has even struck down a legislatively proposed amendment on the basis that the ballot summary was misleading. See Askew v. Firestone. Moreover, this Court has certainly scrutinized other legislatively proposed amendments on this basis. See Grose v. Firestone, 422 So. 2d 303 (Fla. 1982) (finding no violation of the ballot accuracy requirement in a legislatively proposed amendment requiring courts to interpret Florida's constitutional guarantee to be free from unreasonable searches and seizures in conformity with the federal constitutional counterpart); Rivera-Cruz v. Gray, 104 So. 2d 501 (Fla. 1958) (finding that legislatively proposed amendment was actually improper "daisy chain" revision of entire Constitution); Sylvester v. Tindall, 154. Fla. 663, 668, 18 So. 2d 892, 895 (1944) (stating that "the form of the ballot pertaining to [the legislatively proposed] amendment [creating the Game and Fresh Water Fish Commission] was sufficient to put the electorate on notice as to the amendment they were voting upon").

While this Court's review is implicit in the Constitution and legislatively endorsed, I agree that the Court, as explained in Smith, has a more "limited role in reviewing constitutional proposals which have been adopted by the Legislature for direct submission to the people." 338 So. 2d at 826. However, in Smith, this Court did review the legislatively proposed

amendment and determined that because there was doubt as to whether the Legislature violated the "strictures on their amendatory powers," the legislative action must be sustained. Id. at 827.

Chief Justice Wells suggests that the ballot box, and not judicial review, is the proper remedy for a legislatively proposed constitutional amendment. See dissenting op. at 8 (Wells, C.J., dissenting). I do not believe this is an adequate remedy where the voters are not clearly informed as to the effect of the amendment they have endorsed. Voting legislators out of office will not remove from the Constitution an amendment that was passed because of a misleading ballot summary. Instead, the proper and most expedient remedy is to strike a proposed constitutional amendment where "the record . . . show[s] that the proposal is clearly and conclusively defective." Askew v. Firestone, 421 So. 2d at 154.

Nor do I believe that a legislatively proposed amendment would necessarily supersede a prior legislative enactment with which it did not comply. See dissenting op. at 7 (Wells, C. J., dissenting). I would agree that a constitutional amendment would supersede a prior statute dealing with the same subject matter. For example, if the instant proposed amendment related to the accuracy requirements of ballot summary and titles, then it would supersede section 101.161(1). In the instant case, however, the proposed amendment does not deal with the same subject matter as section 101.161. Therefore, the proposed amendment would not supersede section 101.161.

For these reasons and those expressed in the majority opinion, I conclude that the instant challenge is properly before this Court and that Amendment No. 2 should be stricken because the ballot title and summary are misleading.

PARIENTE, J., concurs.

PARIENTE, J. specially concurring.

I agree with the majority that the accuracy requirement of article XI, section 5 "applies across-the-board to all constitutional amendments, including those proposed by the Legislature." (Majority op. at 30; see also majority op. at 14, 17). I further agree with the majority that in this case, neither the ballot title nor the summary complies with the accuracy requirements that are vital for the constitutional amendment process to function fairly. When a constitutional amendment changes the wording of a basic state constitutional right, the electorate must be clearly advised of that change.

As for the question of the timeliness of the petitioners' challenge, it is disconcerting to me that the striking of this amendment comes after the election.[40] However, when the petitioners first filed their petition for writ of mandamus before the election, we declined to exercise jurisdiction by order issued on October 19, 1998. Our order declining jurisdiction stated that our decision was "without prejudice to Armstrong to file an appropriate action in circuit court." I joined in the majority opinion at that time. If there had been any question

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[40]Interestingly, however, one of the apparent purposes of the amendment, which was to ensure that if electrocution was declared unconstitutional as a method of execution that no death sentence would become invalid, has become moot. The Legislature enacted lethal injection into law and when this Court unanimously upheld the constitutionality of the Legislature's decision to switch to lethal injection without invalidating any existing death penalty, we did not rely on our state constitution. See Sims v. State, 754 So. 2d 657, 663 n.10 (Fla. 2000) (concluding that "[i]n light of our holding that the new law may constitutionally apply to Sims, we need not determine the applicability of the 1998 amendments to article I, section 17 of the constitution.").

that the petitioners would be unable to challenge the amendment after the election, I would have joined with the dissenters in a decision to strike the amendment from the ballot at the time of the petitioners' pre-election challenge.[41] Further, as pointed out both by the majority and by Justice Harding's specially concurring opinion, to deny the petitioners' challenge at this time because the election has already taken place would be a departure from both the precedent and practice of this Court.

Indeed, no party to this action questioned the petitioners' right to file the challenge after the election until after oral argument was held, when the Secretary of State filed a supplemental brief belatedly contending that Armstrong could not pursue this appeal because the general election had taken place, the voters had approved the election and the petitioners' actions were dilatory. While we always have the ability to address jurisdictional issues, any claim that the challenge was barred by laches or the dilatory actions of the petitioners should have been raised in the circuit court and not in this Court after oral argument. Moreover, there has been no evidence in this case that the timing and posture of the challenge was a ploy or that it was the result of any type of legal maneuvering.

Although I recognize that we have the obligation to review this petition on the merits, I remain very concerned with the fact that currently no time limits or established procedures exist

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[41] Although this Court declined to exercise its mandamus jurisdiction, I note that this Court has clearly stated that the procedure the petitioners chose--a mandamus petition in this Court--has explicitly been approved of by this Court. See Florida League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992) ("[O]ur precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution."). In hindsight, it now appears that it was inadvisable of this Court to decline to exercise its mandamus jurisdiction in this case at that time.

for a challenge to the ballot title and summary for legislatively approved constitutional amendments. I cannot fault the petitioners in this case with the manner by which they challenged the amendment,[42] but I wholeheartedly agree with Justice Overton's concerns expressed nearly twenty years' ago that "the public is being denied the opportunity to vote because no process has been established to correct misleading ballot language in sufficient time to change the language." Askew v. Firestone, 421 So. 2d 151, 157 (Fla. 1982) (Overton, J., concurring specially). Thus, I join Justice Overton's repeated calls for the Legislature and this Court to "devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal." Id.; see also Advisory Op. to the Att'y Gen. re Tax Limitation, 644 So. 2d 486, 497 (Fla. 1994) (Overton, J., concurring specially); Florida League of Cities, 607 So. 2d at 401-02 (Overton, J., dissenting); Evans v. Firestone, 457 So. 2d 1351, 1356 (Fla. 1984) (Overton, J. concurring). If the Legislature will not act to do so, then I believe it is incumbent on this Court to establish procedures for future challenges to constitutional

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[42]Certainly, there is some question as to the proper procedure for raising these types of challenges as is evident by our own Court's prior opinions. In the past, these cases have been brought to this Court in a variety of ways. See e.g., Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992) (original mandamus petition in Florida Supreme Court); Grose v. Firestone, 422 So. 2d 303, 304 (Fla. 1982) (request for preliminary injunction in the trial court and certified question to Florida Supreme Court); Askew v. Firestone, 421 So. 2d 151, 154 (Fla. 1982) (suit seeking injunctive and declaratory relief in the trial court and certified question to Florida Supreme Court); Sylvester v. Tindall, 18 So. 2d 892, 894 (Fla. 1944) (habeas corpus proceeding in the trial court and appeal to the Florida Supreme Court). The number of different ways in which these claims have been raised further shows the need for uniformity in not only the timing of these ballot summary challenges, but also uniformity in the procedures to be followed in these challenges in order to facilitate review in this Court and provide for expedited review.

amendments so that there is an adequate opportunity to correct inaccurate and misleading ballot titles and summaries before the election. The procedural history of this case clearly points out the necessity for developing such procedures for the future. I thus urge this Court to establish appropriate procedures, but conclude that any decision to establish such procedures must apply prospectively and should not affect the petitioners' challenge in this case.

WELLS, C.J., dissenting.

I have a fundamental difference with the majority concerning whether the Florida Constitution grants this Court the power to strike from the Constitution a constitutional amendment that the Legislature proposed and the voters approved based on a conclusion that the amendment's ballot title and summary were misleading.[43] This amendment was proposed in accord with the procedures set forth in article XI, section 1.[44] There is no assertion that those procedures were

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[43]I also disagree with the majority's finding that petitioner was not dilatory in bringing this action. This proposed amendment was adopted in the general election on November 3, 1998. Petitioner first filed this action on October 9, which was three and a half weeks prior to the election and five months after legislative officers on May 5 signed their joint resolution and filed the proposed amendment with the Secretary of State.

Certainly, article XI, section 5, is not intended to provide a time period within which a citizen can challenge an amendment's placement on a statewide ballot. That provision clearly exists for the purpose of having the amendment published and available for complete reading prior to the election. The majority's interpretation seems to legitimize last-minute litigation which throws ballots into chaos.

[44]Article XI, section 1 of the Florida Constitution provides in relevant part:

not followed when both houses of the Legislature voted unanimously to propose the amendment. The proposed amendment was placed on the ballot pursuant to article XI, section 5.[45] There is no assertion that procedures for submitting the amendment to the voters were not followed. The amendment was approved by well in excess of a majority of the electorate: 72.8 percent voted in favor of the amendment. I read no basis in the Constitution under these circumstances to find that this Court has the power to strike this amendment.

In order to find that it has this extraordinary power, the majority writes into article XI, section 5, an "accuracy requirement"[46] and then holds that the judicially-created requirement provides a basis for this Court to review legislatively-proposed amendments to the Constitution. Language to support this is simply nonexistent in the express language of article XI, section 5. Next, relying upon the created language, the majority finds that this judicially-grafted requirement is breached by coming to the subjective conclusion

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Proposal by legislature.-- Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature.

[45]Article I, section 5 of the Florida Constitution provides procedures for submitting a proposed constitutional amendment to the voters of the State of Florida.

[46]Obviously, "accuracy" is a necessary goal to be striven for on all ballots. However, I cannot agree that there is any language in article XI, section 5, that gives the Court the power to make subjective judgments as to whether language appearing on a ballot is "misleading" for the purposes of assuring accuracy. The present majority opinion appears to concede there is no express constitutional basis for this by saying that this is "implicit in this provision."

that the ballot summary (also unmentioned in article XI, section 5) does not meet this requirement.

The majority cites Askew v. Firestone, 421 So. 2d 151 (Fla. 1982),[47] as precedent for the Court's striking from the ballot a legislatively proposed amendment on the basis that the Court concluded the ballot summary for the proposed amendment was misleading. The majority is correct that the Court did this in Askew. However, neither Askew nor the present majority opinion provide any analysis as to the constitutional basis of that power. Whereas, six years earlier, in dealing with the same section of the Constitution and with considerably more analysis, this Court in Smathers v. Smith, 338 So. 2d 825 (Fla. 1976), had denied a request for such an exercise of power in respect to a legislatively proposed amendment. In Smith, this Court determined in an opinion written by Justice England that the Court had limited power of review in respect to a legislatively proposed amendment. The broad attack upon the proposed amendment rejected in Smith was similar to the attack the majority approves in this case:

> Smith asserts several reasons why the proposed amendment is improper. He suggests that its language is unclear, its meaning obscure and its purpose too vague; that the Legislature lacks power to propose as a constitutional amendment a revision of governmental powers as sweeping and broad as he contends this amendment contains; that the amendment would violate the "one person-one vote" guarantee of the Fourteenth

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[47]In its footnote 19, the majority references other cases. A review of these cases demonstrates that in not a single one did this Court strike from the ballot a legislatively initiated amendment on the basis that the ballot summary adopted by the Legislature was "misleading" or in violation of a statute.

Amendment of the United States Constitution; that the notice of the contents of the amendment which would appear on the ballot violates Section 101.161, Florida Statutes (1975); and that the amendment is inadequate to inform the public of the substantial shift in governmental power which it would effect. Smith also contends that the amendment in reality alters the separation of powers guaranteed in Article II, Section 3 of the Florida Constitution, in that it gives to the Legislature authority to exercise an interpretive power previously reposed exclusively in the judiciary.

The Attorney General, of course, refutes all of Smith's contentions, and further suggests that the defects alleged are in any event not the proper subject for judicial intervention at this stage. This admonition cannot be ignored, and we approach the subject matter of the case mindful of our limited role in reviewing constitutional proposals which have been adopted by the Legislature for direct submission to the people.

> Another thing we should keep in mind is that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution. The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature

> and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.

[Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956).] It is in that framework that we limit our discussion to the critical issue which is here presented by the parties, and we rest our decision solely on the question of whether the amendment was proposed by the Legislature in conformity with Article XI, Section 1 of the Constitution. That section provides:

> Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

Because there is doubt as to whether the Legislature has violated what appear to be strictures on their amendatory powers, we are compelled to sustain this legislative action.

Smith, 338 So.2d at 826-27 (footnote omitted) (emphasis added). The Smith decision was thoroughly reviewed in a law review article written by James Bacchus,[48] who explained:

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[48]James Bacchus, Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith, 5 Fla. St. U. L. Rev. 747 (1977) (hereinafter Bacchus). Bacchus was an aide to Governor Reubin O'D. Askew during the events described in this law review article. Thereafter, he was a member of the United States House of Representatives. Bacchus is now Managing Shareholder in the Orlando office of the law firm of Greenberg Traurig and is also a member of the Appellate Body of the World

> Justice England quoted this admonition at the outset in Smith [quoting Gray v. Golden, 338 So. 2d at 790]. Undoubtedly, he sought to convey the court's awareness of the need for judicial restraint in reviewing the actions of the legislature. This was the framework the court used to justify its decision to limit the discussion in Smith to whether the proposed amendment complied with the procedures set forth in article XI, section 1. And this narrow notion of the judicial role in the amendatory process was mirrored in the Smith decision.

Id. at 769 (footnote omitted). The Bacchus article goes on to note the distinct power given to the Legislature in the amendatory process, which this Court had described earlier in Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912), and Collier v. Gray, 116 Fla. 845, 157 So. 40 (1934). Concerning article XI, section 1, Bacchus wrote:

> Adopted in 1968, this provision resembles its counterpart in the 1885 constitution. To the extent that the two sections are identical, the judicial constructions of the 1885 provision should apply as well to article XI, section 1. Thus, the constitution clearly contemplates that proposed amendments shall be agreed to by a deliberate, final, and affirmative vote of the required members in each house. Likewise, procedural rules for acting on such proposals may be adopted and employed by each house if they are not in conflict with the

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Trade Organization in Geneva, Switzerland.

In its footnote 15, the majority acknowledges Bacchus' conclusion "decrying the lack of adequate judicial control over legislatively proposed amendments and calling for adoption of an explicit accuracy requirement in article XI, section 1", but then the majority proceeds to assume judicial control even though the Constitution has not been changed.

constitution. Furthermore, the legislative power to propose constitutional changes includes the right to reconsider action taken on an amendment when no constitutional provision is violated.

The legislative authority in article XI is not limited in the same ways as the legislative authority in article III. The act of proposing constitutional amendments is not perceived as an ordinary legislative function. Such proposals are not subject to the constitutional provisions regulating the introduction and passage of ordinary legislative enactments. For instance, "[t]he constitutional requirements that bills shall be read on different days or at different times do not apply." And, while a proposal to change the constitution may have a title, it is not required. Perhaps most important, the Governor's approval is not required.

Bacchus at 775-76 (footnote omitted) (quoting Collier, 116 Fla. at 857, 157 So. at 44). In Collier, this Court specifically stated:

While the procedure prescribed by the Constitution for proposals to amend the Constitution must be duly followed and none of the requisite steps may be omitted, yet unless the courts are satisfied that the Constitution has been violated in the submission of a proposed amendment they should uphold it.

16 Fla. at 857-58, 157 So. at 45 (emphasis added). Although the majority here first refers to article I, section 5, as having an "implicit accuracy requirement," the majority basically justifies its power to strike the constitutional amendment on the basis that the Legislature's ballot title and summary are misleading, in violation of section 101.161, Florida Statutes. I believe it is

illogical and contradictory for the Court to conclude that a legislatively proposed amendment fails because it violates a statute. Obviously, a legislatively proposed amendment would supersede a prior legislative enactment with which it did not comply. I conclude that this is the very reason that this Court's precedent has historically required, in respect to legislatively proposed amendments, compliance with constitutionally mandated procedures but not statutory requirements. Collier, 116 Fla. at 857-58, 157 So. 2d at 45.

Likewise, it is contrary to the separation of powers requirements of article II, section 3, for the Court to strike a provision from the Constitution because the Court concluded that the Legislature's presentation of the amendment to the voters was "misleading." This was the proper cautionary warning in this Court's 1956 opinion quoted in Smith, which stated:

> [W]e should keep in mind that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution we are construing. . . . . The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done.

Smith, 338 So. 2d at 826-27 (quoting Gray, 89 So. 2d at 790).

If the Legislature misled the voters, I conclude that the remedy is at the ballot box–not in the Court. There is simply no constitutional authority for a judicial veto of a legislatively proposed amendment, just as there is no gubernatorial veto. I believe it is crucial to always keep in mind that the very first sentence of article 1, section 1, of the Florida Constitution is,

"All political power is inherent in the people." I do not find in article V, which is the article of the Constitution which provides to the Court its power, any basis to conclude that the people have given to the Court the power to intercede between the people and their elected representatives when the Legislature proposes amending the Constitution by the constitutionally required supermajority.

In respect to legislatively proposed amendments, I conclude that the supermajority requirement in the Constitution for the Legislature's placing a proposed amendment on the ballot is a constitutional interest for the legislative branch to perform its own review and censorship of what is to be placed before the people for a vote. This Court has previously acknowledged the distinction in the methods of amending the Constitution:

> It is apparent that the authors of article XI realized that the initiative method did not provide a filtering legislative process for the drafting of any specific proposed constitutional amendment or revision. The legislative, revision commission, and constitutional convention processes of sections 1, 2 and 4 all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal.

Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984).

My view is further bolstered by the express provision in the Constitution for this Court to review citizens' initiatives. The Constitution in article XI provides five methods of amending the Constitution: (1) proposal by Legislature, section 1; (2) revision commission, section 2; (3) initiative, section 3; (4) constitutional convention, section 4; and (5) taxation and budget reform commission, section 6. Only in respect to citizens'

initiatives does the Constitution give to this Court express power to review amendments. Article V, section 3(b)(10), does provide, in respect to this method of amending the Constitution, that this Court

> Shall, when requested by the attorney general pursuant to the provisions of section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Article IV, section 10, provides:

> The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion expeditiously.

Article XI, section 3, pertains to citizen initiatives. In respect to amendments proposed by a constitutional revision commission or a constitutional convention or by the Legislature, the Constitution is silent as to any power given to the Court for review. Since the Constitution does not expressly give the Court this power, I must conclude that the Court should not assume it by implication. Rather, the Court should respect the distinctions between the methods of amending the Constitution which this Court acknowledged in Fine.[49] I agree

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[49]In its footnote 18, the majority attempts to explain this express difference between judicial control over citizen initiatives and legislative amendments on another basis, which simply does not comport with this obvious reason explained in Fine. The reasoning in Fine supports the logic of my conclusions.

with respondent that the exception to this would only be if there was evidence of fraud, which is clearly not present in this case.

Furthermore, I disagree with the majority's reliance upon Wadhams v. Board of County Commissioners, 567 So. 2d 414 (Fla. 1990). I find that case to be distinguishable because it did not involve a legislatively proposed amendment pursuant to article XI, section 1. Wadhams involved a proposal by a board of county commissioners to amend a county charter. I conclude that the rule to be applied in a case in which a legislatively proposed amendment has been approved by the voters was set forth by this Court in Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892 (1944):

> While it is true that the procedure set forth in Section 1 of Art. XVII is mandatory and should be followed, this Court has recognized the almost universal rule that once an amendment is duly proposed and is actually published and submitted to a vote of the people and by them adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, the effect of a favorable vote by the people is to cure defects in the form of the submission.

Id. at 669, 18 So. 2d at 895 (citations omitted).

I recognize that petitioners sought to have this matter canceled from the ballot by a late filing just prior to the election. However, the fact is that this attempt did not succeed. The voters approved the amendment by 72.8 percent of those voting. The majority's post-election analysis as to why the amendment so overwhelmingly succeeded is merely speculation and conjecture, which the rule provided in Sylvester correctly avoids. The record contains no data whatever to support a

finding by the majority that the people were misled by an inaccurate ballot summary.

There is also the fact that the remedy here does not flow from any acceptable legal analysis of the remedies that the petitioners originally sought. The action was originally brought in this Court as a petition for writ of mandamus or, in the alternative, for injunctive relief or a declaratory judgment. The trial court correctly rejected the petitions for mandamus and injunctive relief but certified the issue to the district court of appeal as a declaratory judgment action. However, chapter 86, Florida Statutes (Declaratory Judgments), grants to circuit and county courts the jurisdiction to interpret statutes, county or municipal charters, ordinances, contracts, deeds, wills, franchises, or other articles, memoranda, or instruments in writing. See § 86.021, Fla. Stat. (1997). The statute does not mention legislatively proposed constitutional amendments. Mandamus did not lie because there was no clear legal right.

Finally, though in my view we do not reach the issue, I do not agree with the subjective conclusion of the majority that a unanimous Legislature "clearly and conclusively" misled Florida voters. Rather, I agree with the subjective conclusion of the trial judge that respondent's argument is more persuasive. I conclude that the ballot title and summary do inform that the state constitutional provision against cruel or unusual punishment is to be construed in accord with decisions of the United States Constitution. This is similar to the provision which voters of the state earlier adopted in respect to search and seizure in article I, section 12, which this Court upheld in Grose v. Firestone, 422 So. 2d 303 (Fla. 1982), and which the present majority does not and cannot adequately distinguish. Also, respondent is correct that it has never been determined that there is a material difference between the phrases "cruel or unusual" and "cruel and unusual" for

purposes of the application of capital punishment. I find it to be a particularly strained interpretation where the majority construes that "legislative designation" eliminates a veto by the Governor. "Designated by the Legislature" is already in article X, section 17(b) of the Constitution without controversy. I believe it is significant that the record in this case contains nothing in the way of factual evidence to support the majority's subjective conclusion that misleading language misled the voters. Thus, even if I found in the Constitution the power to review legislatively-proposed amendments, I would not, on the basis of the present record, join in striking from the Constitution what the Legislature and the people themselves have put into the Constitution by such substantial votes.

For the foregoing reasons, the decision of the circuit court should be affirmed and the petitions denied.

LEWIS, J. dissenting.

Once again, the judicial system is being asked not only to intervene in a matter that addresses the intent and understanding of Florida voters in connection with the performance of the most basic function in the democratic process, but in so doing, to invalidate the result of a vote after the citizens of Florida have already exercised their franchise and voiced a decision. I am troubled that challenges to matters that are to be submitted to the people for determination fall victim to strategies that produce judicial reversals in matters that have already been submitted to the electorate, when any challenge or controversy could and should have been submitted for judicial determination in a timely manner, providing sufficient time for full review and resolution prior to the day of decision for Florida voters. While I agree that much of the reasoning expressed by Justice Shaw is certainly intellectually arguable, my analysis of the legal maneuvering by the appellants here compels a different

conclusion with regard to the issue of delay and laches. I must note that this is at least the third occasion within a very short period of time that a request, with very questionable timing, to invalidate action taken by voters has been submitted to this Court for resolution.[50]

First, it is clear that the power of the Legislature to propose amendments to the Florida Constitution arises from article XI, section 1, and submission of such proposed amendments to the electorate for consideration is addressed in article XI, section 5 of the Florida Constitution. Interestingly, the Florida Constitution does not contain a provision which describes the form in which the proposed amendment must be submitted to Florida citizens for consideration, nor is there any constitutional immunity for misleading or ambiguous titles or summaries of such amendments. Thus, the form in which the present issue appeared on the ballot finds no specific constitutional provision for its foundation and, therefore, has no constitutional basis. With this predicate, it seems clear that any alteration in the form of a proposed constitutional amendment as it will appear on a ballot for consideration by Florida citizens has its foundation in the judicial concept that our fundamental law requires that the form of a proposed amendment to the Constitution as it appears on the ballot be fair and advise the voters of sufficient information to permit intelligent voting. This is further codified through the intent expressed in section 101.161, Florida Statutes, which requires that public measures submitted to popular vote be clear and unambiguous.

Here, the form of the proposed amendment as it appeared on the ballot (which was represented to be a summary) was something other than a verbatim recitation of the actual

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[50] See Ray v. Mortham, 742 So. 2d 1276 (Fla. 1999); Garvin v. Jerome, No. SC94751 (Fla. notice filed Jan. 22, 1999).

amendment itself. Since that which was submitted to the voters was merely an interpretation of the amendment itself, I cannot accept the logic which suggests immunity from review with regard to that which is merely an interpretation of what the organic law will be. Therefore, I concur with the views of Justices Shaw and Harding with regard to the role of the judicial system in connection with proposed constitutional amendments.

I depart, however, from the views of my brothers and sisters in the majority, with regard to application of existing standards under the circumstances in this case with particular reference to the timing and sequence of events. Here, those who have challenged the validity of the proposed amendment took no action until less than thirty days prior to the general election, and then sought to circumvent multiple levels of the Florida judicial system by filing directly with this Court. As reflected in the majority opinion, (majority op. at 2), the challengers next sought mandamus, injunctive and declaratory relief in the circuit court--which dismissed the claim for mandamus, denied injunctive relief and withheld determination with regard to declaratory relief. As the files of this Court reflect, by October 28, 1998, the District Court of Appeal had certified to this Court review of the denial of injunctive relief as an issue of great public importance requiring immediate resolution. However, in the interim, the challengers had voluntarily dismissed all claims for injunctive and declaratory relief (majority op. at 3). The dismissal of both claims for injunctive relief and declaratory relief while the issue concerning injunctive relief was pending before this Court prior to the election terminated the judicial activity and permitted the election to proceed. As recognized by this Court in Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992), the only remaining claim was for mandamus which had not been certified to this Court. Further, such remedy could not be used

to establish the existence of the right asserted, but only to enforce a right already recognized by clear and certain established law. As recognized and stated in Florida League of Cities, where there is no clear law requiring a certain result and mere ministerial application of such law, a claim for mandamus relief cannot be used as the mechanism to create a controversy, to resolve the controversy and thereby establish the clear and certain legal right, all in the same proceeding in which mandamus is granted. Thus, in this case, the challengers themselves had taken strategic moves to eliminate review by this Court prior to the general election. It was this maneuvering and untimely challenge by the appellants that precluded full judicial review and resolution prior to the general election. It was not until after the general election had been completed and the results known that a claim for injunctive and declaratory relief was again submitted to the judicial system some thirty days after the election.

In my view, critical review and strict scrutiny of the ballot title and summary of a proposed amendment must be tempered and balanced with the interest of upholding the results of the democratic process and not depriving voters of their franchise by invalidating the decision made at the ballot box when those challenging the ballot language have failed to timely present the dispute to the judicial system so that it may be thoughtfully analyzed and carefully considered for a determination to be made prior to election day. These competing interests must, I suggest, be balanced under the circumstances in this case particularly when both the timing of the challenge and the ballot language are so very similar in concept to those considered and approved by this Court in Grose v. Firestone, 422 So. 2d 303 (Fla. 1982).

While I would never condone or support a legal analysis that would, in effect, permit the voting public to be "hoodwinked"

or defrauded by application of the concept of laches or delay, I conclude that a far better approach here in balancing the respective interests is to analyze whether the asserted defects in the form of the submission to the voters are of such significance as to prohibit or prevent the legitimate expression of the intent of the people as evidenced through the favorable vote of the electorate. Misrepresentations and fraudulent behavior may never be cured by affirmative votes; however, I would not place the asserted ambiguity involved in this case in such category. With the summary here being very similar in concept to that approved in connection with a similar amendment proposed in Grose , I would apply the principle of law that, once an election has been concluded and the result determined, it is the duty of the judicial system to uphold that result, if possible, if the process has been essentially free and fair, the voters have not been essentially deprived of their right to vote due to the alleged defect, and the result has not been so tainted by irregularities as to suggest that the result is not the intent of the electorate. See, e.g., Winterfield v. Town of Palm Beach, 455 So. 2d 359 (Fla. 1984).

It is my view that if one perceives a ballot matter to be deficient with regard to adequate summaries or titles, it is essential that any challenge be instituted in a timely fashion, so that the entire review process by the courts can be completed before an election. This Court has noted in Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892 (1944), that, where it is contended only after the actual vote that the form of a ballot is not sufficient to properly advise the electorate as to what is being voted upon, the required publication and submission to a vote of the people of this State, and the adoption of such provision by the electorate, has the effect of curing minor defects in the form of submission. I do not believe that an allegedly aggrieved party should be permitted to simply await the eve of an election and then challenge an asserted deficiency

which could and should have been resolved prior to the election, if timely pursued.

Although there may be no particular statutory time provision or other specific rules of procedure applicable to the timing of challenges to matters that are to be submitted to the voting public, I believe that the doctrine of laches and delay must be applied here in the balancing of competing interests. If we do not require timely challenges, it is conceivable that parties could simply wait for a controversy to arise with regard to the interpretation of an amended constitutional provision and, if the ultimate judicial resolution of such dispute were contrary to the ballot summary as presented to Florida voters, seek to invalidate the amended section of the Constitution many years later. We must find some balance achieved between demanding integrity of ballot titles and summaries and supporting the integrity of the democratic process by upholding the results of general elections. I would join the suggestion of former Justice Overton that it is imperative that the Legislature and this Court develop rules and procedures by and through which challenges to ballot titles and summaries and challenges to other matters submitted for public vote can be timely and properly judicially reviewed, resolved, and any defects corrected, to allow the citizens of Florida to vote on a proper proposal and not suffer the consequences of lingering after-the-fact litigation.[51] I suggest that these types of challenges should be initiated in the trial court for full factual development with an expedited trial process followed by meaningful review with resolution of the

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[51]Justice Overton announced this philosophy on repeated occasions: Advisory Op. to the Att'y Gen. re Tax Limitation, 644 So. 2d 486 (Fla. 1984) (Overton, J., concurring); Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992)(Overton, dissenting); Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984)(Overton, J., concurring); Askew v. Firestone, 421 So. 2d 151 (Fla. 1982)(Overton, J., concurring).

issues concluded so that the matter could be submitted to the voting public at the time originally contemplated by our Constitution.

QUINCE, J., dissenting.

I agree with that portion of Chief Justice Wells' dissent wherein he concludes the Legislature did not mislead the Florida voters. The ballot title and summary are not misleading but do in fact inform the public that this state constitutional provision is to be construed in conformity with the United States constitutional provision on cruel or unusual punishment and in conformity with the United States Supreme Court decisions construing the federal provision. As Chief Justice Wells points out, this is the same type of provision approved by the people of Florida in regards to the search and seizure provision of our State constitution. See art. I, § 12, Fla. Const.; Grose v. Firestone, 422 So. 2d 303 (Fla. 1982).

Therefore, I would affirm the decision of the circuit court.

Appeal of Judgment of Circuit Court, in and for Leon County, Terry P. Lewis, Judge, Case No. 98-5826 - Certified by the District Court of Appeal, First District, Case No. 1D99-989

Randall C. Berg, Jr., Peter M. Siegel, and JoNel Newman of the Florida Justice Institute, Inc., Miami, Florida,

for Appellants

Robert A. Butterworth, Attorney General, Louis F. Hubener, Assistant Attorney General, James A. Peters, Special Counsel, and Richard B. Martell, Assistant Attorney General, Tallahassee, Florida,

for Appellees

Tom Warner, Solicitor General of Florida, Tallahassee, Florida, on behalf of Robert A. Butterworth, Attorney General, and the State of Florida, and on behalf of Appellees Katherine Harris, et al.

Supreme Court of Florida
MONDAY, OCTOBER 19, 1998

REV. DR. JAMES ARMSTRONG, et. al.,	*	
Petitioners,	*	CASE NO. 94,071
v.	*	
SANDRA MORTHAM,	*	
Respondent.	*	

* *

We decline to exercise jurisdiction without prejudice to file an appropriate action in the circuit court.

HARDING, C. J., and OVERTON, WELS and PARIENTE, JJ., concur.

SHAW, KOGAN and ANSTEAD, JJ., dissent.

A True Copy
TEST
/s/ Sid White

Sid J. White
Clerk, Supreme Court

TC
cc: Mr. Randall C. Berge, Jr.
Mr. Peter M. Siegel
Ms. JoNel Newman
Mr. Richard B. Martell
Hon. Sandra B. Mortham
Hon. Victor D. Crist

Supreme Court of Florida

MONDAY, NOVEMBER 2, 1998

REV. DR. JAMES ARMSTRONG ET AL.,

Appellants,

vs.

SANDRA MORTHAM, et.al,

Appellees.

* CASE No. 94,205
* 1ST DISTRICT CT. OF APPEALS NO. 98-3957
* CIRCUIT COURT No. 98-5826 (LEON)

The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, by order dated October 26, 1998, dismissed appellants' claim for mandamus relief, denied injunctive relief, and withheld ruling on the claim for declaratory relief. A petition for writ of certiorari from the dismissal of the claim for mandamus relief was filed with the district court and treated as an appeal. By order dated October 28, 1998, the First District Court of Appeal certified to this Court the denial of injunctive relief as an issue of great public importance requiring immediate resolution. On October 27, 1998, the appellants voluntarily dismissed their counts for injunctive and declaratory relief.

Under the circumstances, we dismiss this appeal without prejudice.

No motion for rehearing will be entertained by the Court. HARDING, C.J. and OVERTON, SHAW, KOGAN, WELLS and PARIENTE, JJ. concur.

A True Copy

TEST:

/s/ Sid White

Sid J. White
Clerk, Supreme Court

H

cc: Hon. Jon S. Wheeler, Clerk
Hon. Dave Lang, Clerk
w/copy to Circuit Court Judge
Mr. Randal C. Berg, Jr.
Mr. Jonel Newman
Mr. Peter M. Siegel
Mr. James A. Peters
Mr. Richard B. Martell
Mr. Louis F. Hubener

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

THE REV. DR. JAMES ARMSTRONG, et al,

Plaintiffs/Petitioners,

vs.

CASE NO: 98-5826
CIVIL DIVISION

KATHERINE HARRIS, et al,

Defendants/Respondents.
_____ /

FINAL SUMMARY JUDGMENT FOR DEFENDANTS /RESPONDENTS

The Plaintiffs/Petitioners ask that I declare the ballot title and summary for amendment to [sic], which appeared on the ballot and was recently approved by the voters of the State in November of last year, to be violative of Florida law. I have considered the respective Motions for Summary Judgment, the arguments advanced by each side, and the authorities cited in support thereof. Both the Plaintiffs/Petitioners and Defendants/Respondents have done a good job of briefing and arguing the pertinent issues and a lengthy discussion by me or citation to authorities would serve little purpose. Suffice it to say that I find the argument advanced by the Defendants/ Respondents to be more persuasive on each point and, accordingly, it is

ORDERED AND ADJUDGED that the Plaintiffs/ Petitioners Motion for Summary Judgment is denied. The Defendants/Respondents Cross Motion for Summary Judgment

is granted and Final Summary Judgment is hereby entered in favor of the Defendants/Respondents.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 25 day of February, 1999.

/s/ Terry P. Lewis
TERRY P. LEWIS, Circuit Judge

Copies to:

Randall C. Berg, Jr., Esquire
2870 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131 - 2309

James A. Peters, Esquire
Assistant Attorney General
The Capitol
Tallahassee, Florida 32399-1050

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

THE REV. DR. JAMES ARMSTRONG,
THE REV. DR. DOUGLAS BORKO,
THE REV. DR. JIMMIE L. GENTLE,
KATHY BARBER HERSH,
THOMAS A. HORKAN, JR.,
THE REV. FRED B. MORRIS,
REV. FRANKLIN P. SMITH, and
THE REV. DR. BARRY SNOWDEN,

Plaintiffs/Petitioners,

v. CASE NO. 98-5826

SANDRA MORTHAM, in her
official capacity as Secretary of State,

Defendant/Respondent.
_____ /

ORDER ON MOTION FOR PRELIMINARY INJUNCTION, TO CONSOLIDATE WITH TRIAL ON THE MERITS, AND TO ADVANCE CAUSE AND REQUESTS FOR A WRIT OF MANDAMUS AND DECLARATORY JUDGMENT

This cause was heard on Plaintiffs' Motion for Preliminary Injunction, to Consolidate with Trial on the Merits, and to Advance the Cause, and requests for a Writ of Mandamus and a Declaratory Judgment challenging the legal sufficiency pursuant to Fla. Stat. Section 101.161 of proposed Constitutional Amendment 2. The Court, having heard

argument of counsel and considered all the pleadings, it is hereby:

ORDERED AND ADJUDGED:

1. A Writ of Mandamus is not an appropriate remedy. Plaintiffs seek to compel the performance of acts that are not purely ministerial, and no clear legal right to their performance has been established. Moreover, the Court cannot find at this point that the ballot title and ballot summary of the proposed constitutional amendment are clearly and conclusively defective. A writ of mandamus in Fine v. Firestone and Hess by and through Hess v. Metro Dade County may have been appropriate under those cases because the violation was clearly demonstrated. Therefore, the Writ of Mandamus is dismissed.

2. Plaintiffs have not shown their entitlement to a preliminary injunction. An injunction would be highly extraordinary relief, and would create great confusion and disorder with the election only ten days away. The injury to the public far outweighs any injury to the Plaintiffs. The prerequisites for injunctive relief have not been met. Therefore, the Motion for Preliminary Injunction, to Consolidate with Trial on the Merits, and to Advance the Cause is hereby denied.

4. Amendment 2 should be retained on the ballot.

5. There is no dismissal of the request for declaratory relief. The Court reserves ruling on the defense of laches pending discovery.

DONE AND ORDERED this 26th Day of October, 1998, in chambers in Tallahassee, Leon County, Florida

/s/ N. Sanders Sauls

N. Sanders Sauls
Chief Judge

cc: Counsel of Record

Supreme Court of Florida

TUESDAY, DECEMBER 5, 2000

CASE NO.: SC95223
Lower Tribunal No.: 98-5826, 99-989

REV. DR. JAMES ARMSTRONG, ET AL.	vs.	KATHERINE HARRIS, ET AL.
Petitioner(s)		Respondent(s)

Respondents' Motion for Rehearing is hereby denied.

SHAW, HARDING, ANSTEAD, PARIENTE and QUINCE, JJ., concur.

WELLS, C.J., and LEWIS, J., dissent.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

bh
Served:

HON JON S. WHEELER, CLERK
RANDALL C. BERG, JR.
PETER M. SIEGEL
JONEL NEWMAN
BRADFORD L. THOMAS
RANDALL C. BERG, JR.

THOMAS E. WARNER
RICHARD B. MARTELL
LOUIS F. HUBENER
JAMES A. PETERS
HON. N. SANDERS SAULS, JUDGE
HON. DAVE LANG, CLERK

IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE REV. DR. JAMES ARMSTRONG, et al.,	)	
Appellants,	)	
v.	)	Case No. 95,223
KATHERINE HARRIS, in her official capacity as Secretary of State, et al.,	)	
Appellees.	)	

BRIEF OF THE SOLICITOR GENERAL IN RESPONSE TO QUESTIONS RAISED BY THE COURT

On Certification from the District Court of Appeal, First District of Florida

TOM WARNER
SOLICITOR GENERAL OF FLORIDA
Florida Bar No. 176725
On behalf of
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL, and the
STATE OF FLORIDA and on behalf
of Appellees
Office of the Attorney General
PL01 - THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

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[OMITTED]

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[OMITTED]

INTRODUCTION

At oral argument on September 2, 1999, several Justices of this Court posed questions regarding important constitutional concerns presented by this case which were not previously addressed by the parties nor the lower court. Specifically, the questions raised by the Justices were 1) whether the Court has jurisdiction in this declaratory judgment proceeding to invalidate a constitutional amendment approved by the people, and if so what constitutional standard of review should be applied by the Court in a proceeding seeking to strike a provision of the state constitution; and 2) whether the statutory requirements of section 101.161, Florida Statutes, could constitutionally be applied to the Legislature in the exercise of the Legislature's constitutional prerogative to propose an amendment to the state constitution pursuant to Article XI, section 1, Florida Constitution.

These questions clearly implicate the "separation of powers" doctrine and the parallel principle of the mutual respect that one branch of government must have for the powers and responsibilities of another branch under the constitution. As a result, this court needs to squarely address these issues in its decision. The answer provided by this court will have far reaching and significant effects that extend beyond the immediate merits of this cause.

The Solicitor General submits that the Court's jurisdiction to invalidate a constitutional amendment is strictly limited and that once a proposed amendment has been adopted and ratified by the people it is the organic law of the state, and should not be invalidated by the Court on the basis of alleged failures to comply with a statute. Moreover, the provisions of Article XI, section 1 of the Florida Constitution which empowers the Legislature to propose amendments to the Constitution is self-executing and should not be construed to permit a former Legislature to restrict by prior statute the prerogative of any future Legislature in the exercise of a constitutional power specifically conferred upon the Legislature.

I. CONSTITUTIONAL STANDARD OF REVIEW

This Court has long recognized that the standard of review applicable to challenges to constitutional amendments is strictly limited. In West v. State, 39 So. 412 (Fla. 1905), this Court upheld the validity of a constitutional amendment over objections that the Legislature had failed to follow constitutional procedures, not just statutory provisions, in proposing the challenged amendment, stating:

> . . . [we] agree with the Kansas and other courts in the doctrine there announced that in constitutional changes the popular voice is the paramount act; that where a proposed amendment to the Constitution receives the affirmative votes of three-fifths of all the members elected to each house, and such proposed amendment is published and submitted to the vote of the people as required, and at the election is approved and adopted by a majority of the votes of the people cast thereon, then it becomes a valid part of the organic law, notwithstanding the

fact that the Legislature may have failed to have such proposed amendment entered at length upon the journals of the two respective houses.

The Court again reaffirmed this principle in Collier v. Gray, 157 So. 40 (Fla. 1934), stating:

> Constitutional provisions derive their force not from the Legislature, but from the people in whom, under our theory of government, the power is inherent, and in the exercise of such power to make changes in the Constitution there are practically no limits except those contained in the Federal Constitution when such proposals are made in the prescribed manner. Even in case some required form of procedure has been omitted by the Legislature in submitting a proposal to amend the Constitution, but the same had been advertised or the notices published and the people have approved it at an election the amendment becomes a valid part of the Constitution. See West v. State, 50 Fla. 154, 39 So. 412.

Also in State ex rel Landis v. Thompson, 163 So. 270 (Fla. 1935), this Court went on to hold:

> In upholding the ratified amendment as against the attack so made upon it, this Court in the West case, supra, definitely and conclusively aligned itself with the doctrine of a majority of the American courts that in ruling upon the validity of constitutional changes after the popular voice has been expressed in favorably voting upon such changes proposed in the form

> of constitutional amendments agreed to by the Legislature, the popular voice is the paramount act, and that mere formal or procedural irregularities in the framing, manner, or form of submission or balloting, will not be held fatal to the validity of such amendment after it has been actually agreed to by three-fifths vote of all the members elected to each House, and such amendment thereafter duly published submitted to and affirmatively approved by a majority vote of the electors cast thereon.

Clearly, this Court has refused to invalidate a constitutional amendment adopted and ratified by the people even when the Court has recognized that constitutional irregularities (much less statutory irregularities as argued here) occurred in the submission of the proposal to the electorate. The focus of the Court's prior decisions is on the fact that the challenged amendments were properly advertised and published. There is no dispute that the full text of the challenged amendment in this case was properly advertised and published.

No case has been cited to the Court, and the Solicitor General can find no case, in which this Court has invalidated a constitutional amendment based upon allegations of failure to follow a statute. Askew v. Firestone, 421 So.2d 151 (Fla. 1982), is not on point and did not involve a challenge to a constitutional amendment after its adoption and ratification by the people. Furthermore, it is not clear from the decision in that case, whether the parties or the Court ever considered whether Fla. Stat. 101.161 could be properly applied to a constitutional amendment proposed by the Legislature, or that the statute might conflict with the express provisions of the Florida Constitution. (The Solicitor General does not contest the

Court's power to review a constitutional amendment **ballot proposal**, prior to the ratification election to determine whether the proposal was enacted in accordance with the constitution, or whether the **proposal** violates other constitutional provisions).

Nevertheless, this Court should not now adopt a standard of review in this case that permits the Legislature to control by statute the manner in which the Court reviews a constitutional provision. The only appropriate standard by which a challenge to an adopted constitutional provision should be considered is whether the adopted constitutional provision is violative of another paramount state or federal constitutional provision. Gray v. Winthrop, 156 So. 270 (Fla. 1934); State ex rel. Sovereign Camp, W.O.W. v. Boring, 164 So. 859 (Fla. 1935). Such a challenge may be properly raised and presented in due course by a party with appropriate standing. See, Grose v. Firestone, 422 So. 2d 303 (Fla. 1982).

Moreover, the restrictions set forth in section 101.161, Florida Statutes, should not be construed to limit the Legislature's constitutional powers under Article XI, section 1, of the Florida Constitution.

II. THE PROVISIONS OF ARTICLE XI, SECTION 1 OF THE FLORIDA CONSTITUTION ARE SELF-EXECUTING

Article XI, section 1, of the Florida Constitution, states:

> Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The full text of the joint

> resolution and the vote of each member voting shall be entered on the journal of each house.

In this case, the proposed constitutional amendment incorporated in the 1998 House Joint Resolution 3505 was approved by a *unanimous* Legislature 3505 for submission to the voters in the 1998 general election. As required, and such is uncontested, the text of the amendment and the vote was entered on the journal of each house. 1998 House Journal 01944; Senate Journal 01709. The amendment was signed by the Officers, the Speaker of the House and the President of the Senate, and filed with the Secretary of State on May 5, 1998.

The relevant organic law **mandated** that HJR 3505 be submitted to the voters, under the following conditions:

> (a) A proposed amendment to or revision of this constitution, or any part of it, *shall be submitted* to the electors at the next general election held more than ninety days after the joint resolution, . . . proposing it is filed with the secretary of state
>
> (b) Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, *with notice of the date of election at which it will be submitted to the electors,* shall be published in one newspaper of general circulation in each county in which a newspaper is published.
>
> © If the proposed amendment or revision is approved by vote of the electors, *it shall be effective as an amendment to or revision of the*

> *constitution* of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

Article XI, section 5, Fla. Const. The Solicitor General notes that the *entire proposed constitutional amendment, not a summary,* must be published in each journal of the Legislature and in newspapers of general circulation.

The Solicitor further notes that the founders designed this process to allow the electorate sufficient time to and opportunity to be informed as to the content and the merit of a proposed constitutional amendment approved by the legislature, both through the extensive attention of the legislative process itself and publication of the entire amendment not once, but twice, with the date of the election, before the election occurs. This extensive process does not contemplate nor anticipate that additional substantive requirements must be met before the voters are assumed to be on notice of the proposed constitutional amendment.

These constitutional procedures for legislative approval of a proposed constitutional amendment to be submitted to the voters are clearly self-executing. Gray v. Bryant, 125 So.2d. 846 (Fla. 1960). In Bryant, this Court stated the test for determining whether a constitutional provision is self-executing in construing organic law that authorized the creating of judicial appointments. In addition, this Court recognized the fundamental rights of the people to obtain the benefits and use of self-executing constitutional provisions:

> The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is

whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing.

Unquestionably Section 6(2), Article V lays down a sufficient rule by which the number of circuit judges which the people have dictated shall be furnished to them may be readily determined without enabling action of the legislature.

* * *

It seems clear to us that the subject provision meets the test and should be construed to be self-executing and as not requiring legislative action to activate the effect of its provisions as to number of judges.

There are other reasons why we feel that the section must be so construed.

The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions

are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.

* * *

The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfil the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.

* * *

Where there is a choice as here such a constitutional provision must always be construed to be self-executing for such construction avoids the occasion by which the people's will may be frustrated.

* * *

We therefore hold that Section 6(2), Article V, is self-executing and that upon certification of the 1960 federal census vacancies would exist in the office of circuit judge not only in the circuits for which the legislature has provided enabling legislation, but also in those circuits in which

> the legislature has not provided such legislation, if the 1960 federal census figures indicate the presence of such vacancies.

125 So.2d. at 851-53.

The Solicitor General respectfully submits that the detailed constitutional procedures Article XI for legislatively-sponsored proposed constitutional amendments are self-executing under this test. State of Florida ex Rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561 (Fla. 1980). In Proposition for Tax Relief, this Court accurately described the initiative process for constitutional amendments, stating:

> This is a self-executing constitutional provision. *It clearly establishes a right to propose by initiative petition a constitutional amendment which may be implemented without the aid of any legislative enactment*. In this regard, this initiative process has already produced a constitutional amendment which was adopted without the benefit of the subject statute or rule. Art. II, s. 8 (Ethics in Government).[Citation omitted; emphasis supplied.]

386 So.2d at 566. In Citizens Proposition for Tax Relief this Court invalidated a rule adopted by the Secretary of State which purported to impose additional substantive requirements, an expedited date for submission of a verified initiative petition preceding a general election.

The command in the constitution that if certain steps are taken the proposed amendment *shall be submitted to the electors* is mandatory. If the constitutional requirements are

met, this Court has no authority to strike the proposed amendment from the ballot or remove it from the constitution, once approved. Gray v. Moss, 115 Fla. 701, 156 So. 262 (1934). In Moss, this Court stated that:

> If a duly proposed amendment to the state constitution does not specifically violate some provision of the Federal Constitution and is not wholly void or inoperative, its submission to the electorate of the state for approval or rejection as required by . . . [the state] constitution should not be enjoined, since the courts are not authorized to interfere with the processes prescribed by the Constitution for proposing and adopting amendments to the Constitution, even by controlling ministerial duties incident to the submission of a duly proposed organic amendment . . . ."

As was said in Pope v. Gray, 104 So.2d 841 (Fla. 1958): " Sovereignty resides in the people and the electors have a right to *approve or reject* a proposed amendment to the organic law of the state, limited only to those instances where there is an entire failure to comply with a plain and essential requirement *of the organic law*. . . ." 104 So.2d at 842. Obviously, if a proposed constitutional amendment does not comply with provisions of *organic law*, this Court is empowered to intercede. For example, if a proposed joint resolution did not pass by three-fifths vote of the membership of each house, was not published in the journals of both houses, was not published in a newspaper of general circulation of each county in which a newspaper was published, or violated any other relevant provision of Article XI, this Court would be required to strike the proposed amendment from the ballot before the election.

On November 3, 1998, 2,676,043 voters, 72.8% of those voting, approved Amendment Two, the highest popular vote and second-highest percentage of all thirteen proposed constitutional amendments. **Under the provisions of the controlling organic law, HJR 3505** is the law of the Florida Constitution, as no one has ever alleged, much less demonstrated, that the joint resolution did not comply with any relevant constitutional requirement or violate any provision of the superior federal constitution.

The state constitution does not permit litigants such as the challengers to HJR 3505 here, who have never even demonstrated standing to bring an unauthorized legal action, to wield an extra-constitutional prerogative to thwart the will of the legislature and 2.67 million voters, by claiming the right to invalidate HJR 3505 on the basis of an alleged violation of a general law, Section 101.161, Fla. Stat. See, Gray v. Bryant, 125 So.2d. 846 (Fla. 1960). In Bryant, this Court properly interpreted a statute which apparently contradicted Article V, Fla. Const., noting that:

> [i]f construed literally, the second sentence of Section 26.02(1) [Fla. Stat.] is in conflict with the first sentence thereof and with Section 6(2), Article V and is therefore *unconstitutional and void*. If construed to mean that there will be one circuit judge resident in each county of the circuit before more than one is resident in any county, the sentence can be held to be valid and gives effect to what we find to be the legislative intent. We so construe its meaning. [Emphasis supplied.]

125 So. 2d at 850. Such a process would violate a fundamental principle of state constitutional law and representative

democracy. Such a procedure would grant a few disgruntled citizens a power superior to the state's organic law and the elected representatives.

Nothing enacted by general law can possibly be interpreted to grant this right without doing grave injury to the body politic and possibly violating the voters' right to a representative democracy. See State ex.rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561, 566 (Fla. 1980) (right to amend state constitution through initiative is a fundamental right). To the extent that Section 101.161, Florida Statutes, purports to implicitly confer any judicial review that would allow such a result, that statute must be invalid as it is unconstitutional. Citizens Proposition for Tax Relief, 386 So.2d at 566 (Fla. 1980): "The delicate symmetric balance of this constitutional scheme must be maintained, and any legislative act regulating the process should be allowed only when necessary to ensure ballot integrity." In noting the legislature's authority to proposed constitutional amendments to the electors for approval, in Proposition for Tax Relief, this Court described that authority as "the power of the legislature to propose amendments by its legislative action *without executive check.*" 386 So. 2d at 566 (emphasis supplied). Clearly, this same self-executing constitutional process that does not authorize an "executive check" to block the legislature's power to propose constitutional amendments, does not grant a "judicial check" to invalidate a legislature's proposed amendment based on an alleged violation of an inferior general law not authorized by the self-executing constitutional process.

CONCLUSION

It is axiomatic that a state statute cannot contradict a controlling provision of constitutional law or a court decision

interpreting the controlling constitutional provision. The Solicitor General respectfully asserts that this Court must interpret that provision of general law as clearly inferior to self-executing constitutional procedures. Section 101.161, Fla. Stat, must be read as essentially a ministerial provision which provides for a convenient manner in which the voter may briefly recall a proposed amendment *which has been debated in the legislative process, published in the journals of both houses, and published twice, within a four-week period before the election.* Under the Florida Constitution, the voter is assumed by organic law to have notice of the proposed amendment. The superior state-constitutional provision requires no more, and no provision of general law can be interpreted to impose additional notice requirements that would authorize a substantive analysis of the "merits" of the ballot title and summary.

The Solicitor General further urges this Court to recognize a standard of review of a constitutional amendment proposed by the Legislature that has complied with all relevant provisions of self-executing constitutional requirements, to wit: Absent a conclusive demonstration that the manner in which the Legislature has prepared a ballot title and summary in a joint resolution demonstrates fraud, deceit or trickery in violation of the federal constitution or the fundamental constitutional political rights of the electorate, the courts must defer to the Legislature's determination that its ballot title and summary is valid.

Finally, while the Solicitor General also asserts that this case can be distinguished from Askew v. Firestone, that decision, to the extent that it interprets Section 101.161, Fla. Stat. to allow a broader power of judicial review under general law of a proposed constitutional amendment that is in compliance with self-executing provisions of Article XI of the Fla. Const., should be modified or no longer followed. To do

otherwise would violate the people's fundamental rights to amend their organic charter. The "merits" or flaws of the Legislature's proposed ballot title and summary involve political questions, not justiciable issues, absent blatant misrepresentations or fraud.

Respectfully submitted

/s/ Tom Warner

TOM WARNER
SOLICITOR GENERAL OF FLORIDA
Florida Bar No. 176725
On behalf of
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL, and the
STATE OF FLORIDA and on behalf
of Appellees

Office of the Attorney General
The Capitol - PL01
Tallahassee, Florida 32399-1050
(850) 414-3300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RANDALL C. BERG, Jr., Esq., and PETER M. SIEGEL, Esq., Florida Justice Institute, Inc., 2870 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2309 this 17th day of September, 1999.

/s/ Tom Warner
TOM WARNER

IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE REV. DR. JAMES ARMSTRONG, et al.,	)
Appellants,	)
v.	) **Case No. 95,223**
KATHERINE HARRIS, in her official capacity as Secretary of State, et al.,	)
Appellees.	)

MOTION FOR REHEARING

Pursuant to Rule 9.330 of the Florida Appellate Rules, the Attorney General and Solicitor General move the Court to reconsider its decision in this case and grant rehearing on the grounds that the Court overlooked or misapprehended the following matters:

1. The constitution does not require a ballot summary for legislative proposals to amend or revise the constitution. Constitutional requirements and any concept of fair notice would be satisfied by publishing "the proposed amendment" in accordance with Article XI, Section 5(b) and printing the full text on the ballot. The requirement for a ballot summary containing the substance of the proposed amendment printed in "clear and unambiguous language"(in 75 words or less) is an

express statutory provision, which the Court may enforce without finding and applying an implicit "accuracy" requirement in Article XI, Section 5(a).

2. Prior to the decision in this case, no Florida court has ever nullified a statewide democratic election or repealed a constitutional amendment approved by the people. In doing so here, the Court fails to distinguish the post-election requirements for nullifying a democratic statewide election from pre-election requirements to remove a proposed constitutional amendment from the ballot. The result of the Court's decision will be to overrule long standing precedent requiring either fraud affecting the integrity of the election or substantial non-compliance coupled doubt as to whether the election reflected the will of the people.

3. The court's holding removes all time limitations and equitable defenses for post election challenges to previously approved constitutional amendments. If voter approval of a constitutional amendment is a "nullity" where the ballot summary is not "accurate", such amendments are void ab initio and cannot be saved by the passage of time. The holding thereby creates great uncertainty regarding other amendments approved by the voters in 1998, and before, and will encourage persons to wait until after elections to challenge the validity of constitutional amendments.

4. Unlike citizen initiatives, a legislative proposal to amend the constitution may embrace more than one subject and have several purposes. Thus, a determination of the "chief purpose" is a subjective exercise that should be left to legislative discretion in the absence of fraud or deceit. In this case, the Armstrong plaintiffs did not allege (nor did they argue) that the ballot summary did not state the "chief purpose" of the amendment. In any event and contrary to the Court's

opinion, the record indicates that the "chief purpose" of the amendment was to provide a referendum on the death penalty.

WHEREFORE, the Attorney General and the Solicitor General respectfully request the Court to grant rehearing on the grounds set forth above and as more fully explained by the memorandum attached hereto. **Due to the tropical storm and the closure of state offices (and the Court), Appellees were unable to finalize the memorandum. Thus, it is not attached hereto, but will be filed on Monday, September 25.**

Respectfully submitted this 22nd day of September, 2000.

/s/ Kent Wetherell for
ROBERT A. BUTTERWORTH
Attorney General
Florida Bar No. 114422

The Capitol - PL01
Tallahassee, FL 32399-1050
(850) 487-1963

/s/ Kent Wetherell for
THOMAS E. WARNER
Solicitor General
Florida Bar No. 176725

The Capitol - PL01
Tallahassee, FL 32399
(850) 414-3681

Counsel for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RANDALL C. BERG, Jr., Esq., PETER M. SIEGEL, Esq., JONEL NEWMAN, Esq., Florida Justice Institute, Inc., 2870 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2309 this 22nd day of September, 2000.

/s/ Kent Wetherell for
TOM WARNER

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REHEARING

For the first time, a Florida court has nullified the vote of the people in a statewide democratic election. For the first time, a provision of the Florida Constitution has been removed, not by the people, but by this Court. The opinion of this Court has fundamentally affected the right of the people to amend their constitution and strikes at the very heart of the electoral process and our republican form of government. The opinion also opens the question of whether other previously approved amendments to the constitution may now be subject to challenge. The Attorney General and the Solicitor General respectfully request this Court to reconsider its decision and grant rehearing in accordance with the Motion for Rehearing (filed September 22, 2000) and the following memorandum in support of the motion.

A. THE COURT'S DECISION OVERRULES LONG-STANDING PRECEDENT BY FAILING TO DISTINGUISH BETWEEN POST-ELECTION REQUIREMENTS FOR NULLIFYING A DEMOCRATIC STATEWIDE ELECTION FROM PRE-ELECTION REVIEW TO REMOVE A PROPOSED AMENDMENT FROM THE BALLOT.

The final sentence of the majority opinion states: ". . . we conclude that proposed Amendment No. 2 must be stricken." Slip op. at 33 (emphasis supplied). However, "proposed" Amendment No. 2 does not exist. What does exist, since January 5, 1999, is a provision of the Florida Constitution

approved by the people of the State of Florida in a statewide election. This is not a case to remove a proposal from the ballot. The Court's approach to this case and use of a standard of review for proposed amendments demonstrates a fundamental misapprehension of the appropriate analysis under the Court's precedent. The Court should grant rehearing and apply the standard of review it has previously employed when considering invalidation of an election and disenfranchising the voters and citizens of this state.

The first sentence of the Florida Constitution states: "All political power is inherent in the people." See art. I, § 1, Fla. Const. Accord art. IV, § 4, U.S. Const. (guaranteeing each State a republican form of government). In Carn v. Moore, 76 So. 337 (Fla. 1917), this Court held:

Republics regard the elective franchise as sacred, and the courts should not set aside an election because some official has not complied with the law governing elections, where the voter has done all in his power to cast his ballot honestly and intelligently, unless fraud has been perpetrated or corruption or coercion practiced to a degree to have affected the result.

Id. at 339. For over eighty years, this Court has not receded from this holding. The Court's "sacred regard" for the elective process is a foundation of the constitutional guarantee of a republican form of government. Under this long-established principle of law, the basis for nullification of the vote of the people of the State of Florida is where ". . . fraud has been perpetrated or corruption or coercion practiced to a degree that affected the result." Ibid.

There is no case in which this Court has invalidated a statewide election. Cf. Sylvester v. Tindall, 18 So.2d 892 (Fla. 1944) (expressly refusing to invalidate election on a

constitutional amendment).[1] In cases challenging local elections, this Court has likewise refused to thwart the vote of the local electorate absent clear evidence of fraud which permeated the election. For example, in Bolden v. Potter, 452 So.2d 564 (Fla. 1984), this Court stated:

> We reiterate our previous statement that courts must not interfere with an election process when the will of the people is unaffected by the wrongful conduct. However, when there is present fraud and intentional wrongdoing, which clearly affect the sanctity of the ballot and the integrity of the election process, courts must not be reluctant to invalidate those elections to ensure public credibility in the electoral process.

Id. at 566 (citations omitted). The touchstone of the Court's precedent is record evidence of actual fraud and intentional wrongdoing. The factual trial record in Bolden clearly established a pattern of corruption in the absentee ballot process, including the sale of votes, resulting in the Court's invalidation of all absentee ballots. Even in Bolden, however, this Court did not invalidate the election.

In Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720 (Fla. 1998), despite a showing of gross impropriety and negligence, this Court upheld the local election:

> We hold that there is a necessary distinction between an election contest with a judicial

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[1] See also Burton v. State of Georgia, 953 F.2d 1266, 1269 (11th Cir. 1992) ("We are aware of no cases in which a federal court has invalidated a state election on grounds like those asserted by plaintiffs [i.e.; misleading ballot language].").

> determination of fraud and an election contest with a judicial determination of substantial noncompliance with statutory election procedures, even if the noncompliance is determined to be a result of gross negligence by election officials.
>
> * * *
>
> In sum, we hold that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing as we have defined it, the court is to void the election only if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.

Id. at 725.

The Court's opinion in this case overlooks, misapprehends, or overrules long standing precedent which requires a showing of actual fraud, intentional wrongdoing, or gross negligence which adversely affected the integrity of the election, in order to challenge the validity of an election. See Boardman v. Esteva, 323 So.2d 259, 269 (Fla. 1975). The Court's opinion in this case, however, does not find that "fraud has been perpetrated or corruption or coercion practiced to a degree to have affected the result." See Carn, 76 So. at 339. The Court's opinion in this case neither discusses nor distinguishes its prior precedent regarding invalidation of an election.[2]

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[2] The Court's opinion relies heavily on Wadhams v. Board of County Commissioners of Sarasota County, 567 So. 2d 414 (Fla. 1990), which involved a local charter amendment. However, a local charter amendment is fundamentally and constitutionally different than an amendment to the Florida Constitution proposed by a co-equal branch of government and

This case is controlled by Sylvester v. Tindall, 18 So.2d 892 (Fla. 1944), which involved a post-election challenge to a constitutional amendment proposed by the Legislature. The defect in the ballot summary which the election "cured" in Sylvester was the same as the defect alleged in this case: an allegedly misleading ballot summary which "was not sufficient to put the electorate on notice as to just what they were voting on." Id. at 895. The constitutional amendment at issue in Sylvester created the Game and Fresh Water Fish Commission and conferred upon it broad and exclusive regulatory authority over certain fish and wildlife species; however, the ballot summary did not describe the scope of that authority or the fact that the authority was taken from the Legislature and given to the commission.[3] If the defect in the ballot summary in Sylvester "was not a serious one" and was sufficient to inform the electorate of what they were voting on, any defect in the ballot summary for Amendment No. 2 should also be

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approved by more than 2.6 million voters. Accordingly, the comments of Justice Kogan in his dissent in Wadhams adhering to the Court's "sacred regard" for the election process are even more compelling in the context of this case. Id. at 419 (Kogan, J., dissenting) (quoting Carn).

[3] The ballot summary for the amendment at issue in Sylvester provided:

> To amend Article IV of the Florida Constitution by adding section 30 providing for conservation of birds, game, fur bearing animals and fresh water fish, creating a commission and conferring powers to administer laws for such purposes.

Sylvester, 18 So.2d at 894-95. This ballot summary would likely not survive this Court's review today. Cf. Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Comm'n, 705 So.2d 1351 (Fla. 1998) (striking an initiative to create the Fish and Wildlife Conservation Commission from the ballot because the summary failed to inform voters that the amendment would strip the Legislature of certain powers).

considered constitutionally insignificant, in the absence of any showing that the outcome of the election was affected.[4]

B. THE COURT'S OPINION ERRONEOUSLY ELEVATES A STATUTORY REQUIREMENT FOR PRE-ELECTION REVIEW OF PROPOSED BALLOT LANGUAGE TO A CONSTITUTIONAL MANDATE OF "ACCURACY," WHICH IS NOT SUPPORTED BY FORMER PRECEDENT OF THIS COURT.

The majority opinion creates a new constitutional requirement for "accuracy" in a case where the pleadings and briefs clearly show that the Armstrong plaintiffs sought enforcement of the specific provisions of section 101.161, Florida Statutes. Furthermore, the Court's constitutional analysis and definition of "accuracy" is not supported by the cases cited in the majority opinion.

The only constitutional requirements for a legislatively proposed constitutional amendment are contained in Article XI, sections 1 and 5 and by reference, Article III, sections 1, 4, 6 and 7 of the Florida Constitution: the Legislature must be in proper Session, with a proper quorum; the proposed amendment must be contained in a duly enacted joint

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[4] The relevant constitutional and statutory provisions in effect when Sylvester was decided are substantially the same as those presently in effect. The constitution then (Art. XVII, § 1), as now (Art. XI, § 5), did not expressly provide standards for presenting constitutional amendments on the ballot; the statutory standards then (§ 99.16, Fla. Stat. (1941)), as now (§ 101.161(1), Fla. Stat.), require only that the "substance" of the amendment be printed on the ballot.

resolution, signed by the presiding officers, secretary, and clerk; the resolution must be passed by a three-fifths vote of the membership of each house and the full text and the vote of each member must be entered on the journal of each house; the "proposed amendment" must be submitted to the electors at the next general election more than ninety days after the joint resolution is filed with the Secretary of State; and the "proposed amendment" and notice of the election must be published in a newspaper in each county in accordance with article XI, section 5(b).

Specifically, the constitution does not require a ballot summary for legislative proposals to amend or revise the constitution. The requirements for a ballot summary containing the substance of the proposed amendment printed in "clear and unambiguous language"(in 75 words or less) are solely extra-constitutional statutory provisions of section 101.161, Florida Statutes. Without this statute, the Legislature could meet constitutional standards by printing the full text of the amendment on the ballot and omitting the summary.[5]

In this case, it is clear from the pleadings and briefs that the Armstrong plaintiffs sought to enforce the statutory requirement that the summary contain the substance of the proposed amendment in clear and unambiguous language. The court could have enforced these requirements prior to the election, (as it did in Askew), without creating and applying an implicit "accuracy" requirement in Article XI, section 5(a). However, as discussed in the previous section of this memorandum, after the amendment was approved by a vote of

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[5] Indeed, the Legislature has repealed the applicability of these provisions to legislative amendments. See ch. 2000-361, § 1, Laws of Fla. (amending § 101.161(1), Fla. Stat.). Thus, there is no present requirement that there be a ballot summary for amendments proposed by the legislature.

the people in a statewide election, something more than non-compliance with a statute is required to set aside and nullify that election.

If this new "accuracy" requirement is intended to be that something more, the four cases cited by the majority opinion do not support that conclusion or justify declaring voter approval a "nullity." See slip op. at 8 n.15 (citing cases for this proposition). In Askew v. Firestone, 421 So.2d 151 (Fla. 1982), where this court removed a legislative amendment proposal from the ballot prior to the vote, the Court's ruling was based solely on the enforcement of section 101.161 (and an express finding that the legislature attempted to disguise the true meaning of the amendment); not any constitutional grounds. Hill v. Milander, 72 So.2d 796, (Fla. 1954), another case relied upon by the majority in this case, does not provide any support for the holding that there is a constitutional "accuracy" requirement for ballot summaries in Article XI, section 1, "codified" by section 101.161. Hill involved a post-election challenge to a city charter amendment, created by a special act and governed by the express requirements of Article III, section 21 of the 1868 Florida Constitution (now, Art. III, section 10). There was no reference to Article XI, section 5, and section 101.161 did not apply to the issues in that case. The court in Hill refused to invalidate an election based on failure to print the full text of the charter amendment because the ballot summary and public discussion gave "fair notice". Likewise, neither Smathers v. Smith, 338 So. 825 (Fla. 1976), nor Crawford v. Gilchrist, 59 So. 963 (Fla. 1912), support the majority's "accuracy" requirement under Article XI, section 5, its definition, or the nullification of an election approving the amendment. Crawford involved a proposed amendment which was held invalid under Article III, section 7, and Article XI, Section One, because the joint resolution was not signed by the presiding officers and was not intended to be a proposed

amendment. The proposed amendment in Crawford was removed from the ballot prior to the election. The pre-election decision in Smathers was based solely on questions of germanity as to the proper placement of the amendment in the constitution and whether the amendment constituted a revision or amendment to a section or an article. The decision in Smathers was not based on whether the ballot summary was accurate or misleading, nor any application of section 101.161. Most importantly, the court in Smathers resolved all reasonable doubts in favor of the Legislature and did not remove the amendment proposal from the ballot.

Thus, of the four cases cited by the majority in this case to support its implicit accuracy requirement under Article XI, section 5, only Hill involved a post-election challenge (which was denied), and that case relied on the special act provisions of the constitution, not Article XI, section 5. Of the other three cases, two (Smathers and Crawford) did not involve ballot summary "accuracy" or Article XI, section 5. In the remaining case (Askew), the court expressly found that the Legislature attempted to deceive the voting public.

The discussion above illustrates that it is not appropriate for this Court to nullify a vote of the people on purely statutory grounds, without more, or to imply an "accuracy" requirement for ballot summaries within Article XI, section 5. The cases relied on by the Court do not provide clear and consistent support, nor a clear and consistent definition of this new "accuracy" requirement. Had the court entertained this action prior to the election, section 101.161 and Askew could have been relied on to remove the proposed amendment from the ballot, if there was a finding that the ballot summary attempted to disguise the true meaning of the amendment or that it failed to explain the substance in clear in unambiguous language. As explained above, however, unless the Court holds that over 2.6

million Florida voters were deceived by the Legislature, failure to comply with section 101.161 is not sufficient grounds for this court nullify a vote of the people.

Finally, it should be noted that the ballot summary for Amendment No. 2 provided the same notice to the electorate as the ballot summary considered in Grose v. Firestone, 422 So.2d 303 (Fla. 1982). In drafting the joint resolution placing Amendment No. 2 on the ballot the Legislature was entitled to (and did [R. 101, 305]) rely on the precedent of this Court as set forth in Grose. See Greater Loretta Improvement Ass'n v. State ex rel. Boone, 234 So. 2d 665, 668 (Fla. 1970) (recognizing the "instability in the law" which would result if the Court receded from the decision which the Legislature relied upon in crafting a law). In light of the Legislature's express reliance on Grose, its action should not now be characterized as deceptive. Moreover, the majority's failure to substantively distinguish Grose (slip op. at 22 n. 27) suggests that decision or the logic therein is no longer good law. The Court should grant rehearing to address that issue.

C. THE ARMSTRONG PLAINTIFFS DID NOT ALLEGE (NOR DID THEY ARGUE) THAT THE BALLOT SUMMARY DID NOT STATE THE "CHIEF PURPOSE" OF THE AMENDMENT, AND, THE RECORD INDICATES THAT THE "CHIEF PURPOSE" OF THE AMENDMENT WAS TO PROVIDE A REFERENDUM ON THE DEATH PENALTY.

Unlike citizen initiatives, a legislative proposal to amend the constitution may embrace more than one subject and have several purposes. Thus, a determination of the "chief purpose" is a subjective exercise that should be left to legislative discretion in the absence of fraud or deceit. In this case, the Armstrong plaintiffs did not allege (nor did they argue) that the ballot summary did not state the "chief purpose" of the amendment. In any event and contrary to the Court's opinion, the record available indicates that the "chief purpose" of the amendment was to provide a referendum on the death penalty.

The majority opinion boldly states that the "chief purpose" and "main effect" of Amendment No. 2 is "to nullify the Cruel or Unusual Punishment Clause." Slip op at 22-23. That conclusion is not supported by the record and overlooks the social and political context which led the Legislature to propose Amendment No. 2. Amendment No. 2 was proposed by the Legislature at a time when the constitutionality of the electric chair, and the death penalty itself, was cast into doubt by decisions of this Court. See Jones v. State, 701 So.2d 76 (Fla. 1997) (upholding constitutionality of the electric chair on a 4 to 3 vote with Justice Harding urging the legislature to avoid a "constitutional 'train wreck'" by changing the method of execution to lethal injection).[6]

Then-Chief Justice Kogan fueled the uncertainty over the future of the death penalty in Florida when he publicly questioned its continued viability on several occasions:

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[6] Justice Shaw's dissent in Jones (joined by Justices Anstead and Kogan) clearly raised the specter that a method of execution - or potentially even the death penalty itself - could be invalidated under the Florida Constitution even if it were valid under the U.S. Constitution. Id. at 83-84 (Shaw, J., dissenting).

> "We have to ask ourselves if it [is] not time for us to rethink whether or not capital punishment is viable remedy for the crime of first-degree murder," Kogan said.[7]
>
> State Supreme Court Chief Justice Gerald Kogan says the death penalty isn't working, and he wants Floridians to consider whether to abolish it.[8]

The Legislature took Justice Kogan's comments at face value and, through Amendment No. 2, provided the people with the opportunity to not only to reaffirm their support of the death penalty as an authorized punishment for capital crimes, but also to ensure that the death penalty (and any legislatively-approved method of execution) would be allowed in Florida unless held unconstitutional by the United States Supreme Court. The ballot title and summary informed the people of this "chief purpose" and the people's response was overwhelming with over 2.6 million people voting in favor of Amendment No. 2. [R. 310]

The record does not support the majority's conclusion that the "chief purpose" is something other than a general referendum on the death penalty. Indeed, the only evidence in the record relating to the purpose of Amendment No. 2 is the staff analysis for the joint resolution adopted by the Legislature [R. 94-102, 298-306] and a collection of newspaper articles and editorials discussing Amendment No. 2 [R. 207-20]. Those

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[7] Kilian, Chief Justice Shares Parting Thoughts with Judges, Fla. Bar. News (July 15, 1998).

[8] Chief Justice Says State Death Penalty Isn't Worth Keeping, Orlando Sentinel (Jan. 2, 1998).

documents confirm the Legislature's "chief purpose" for proposing Amendment No. 2 and also confirm that the public was informed of that purpose above and beyond the ballot summary. The staff analysis discusses the slim and potentially changing majority in Jones decision and further states:

> The proposed amendment to the state constitution would ensure that the Florida Supreme Court does not rule the death penalty unconstitutional unless the death penalty also violates the United States Constitution. [R. 94, 298].
>
> .... Other clauses in the state constitution, such as the due process clause, could not be used to abolish the death penalty for violating the state constitution since the proposed amendment explicitly states that "the death penalty is an authorized punishment for capital crimes. [R. 101, 305]

The newspaper articles judicially noticed by the trial court and included in the record were equally direct in explaining the "chief purpose" of Amendment No. 2:

> [T]he amendment suspends the Florida Supreme Court's jurisdiction over the death penalty and gives it the U.S. Supreme Court. [R. 207]
>
> It would change language in the state constitution to conform with the United States Constitution. State law would change from banning "cruel *or* unusual punishment" to "cruel *and* unusual." [R. 208 (italics original)]

> The amendment would change the language of the state Constitution to make it conform precisely to the language of the federal Constitution's Eighth Amendment. [R. 217]
>
> I]t pre-empts the Florida Supreme Court from determining what constitutes "cruel and unusual," and it would force the state court to abide by the U.S. Supreme Court's definitions in such cases. [R. 219]
>
> Some lawmakers are concerned that the state Supreme Court might strike down Florida's death penalty as unconstitutional. That's in part because of the difference of a single word between the Florida Constitution and the U.S. Constitution. [R. 220]

In light of the political climate in which Amendment No. 2 was proposed as well as the extensive press coverage on Amendment No. 2,[9] the majority opinion is clearly at odds with the drafters' and the public's understanding of the "chief purpose" of the Amendment No. 2. Indeed, the best evidence that there was no confusion on the part of the electors is demonstrated by the fact that in the two years subsequent to the voters' approval, there has been no expression of voter outrage for being misled or confused regarding this proposal. Further, in the subsequent two legislative sessions, no member has filed any measure to further revise Article I, section 17 based upon any constituency's outrage.

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[9] The Court's precedent recognizes the "other means of communicating and disseminating information" on a ballot question. See Hill v. Millander, 72 So.2d 796, 798 (Fla. 1954).

Finally, the majority's opinion as to the main legal effect of the amendment begs the question as to what the legislature should have explained to the voters about "cruel and/or unusual punishment" as of November 1998. It was not until July of 1999, after the voters had approved Amendment No. 2, that this court definitively applied Florida's cruel or unusual clause any differently than the United States Constitution's clause barring "cruel and unusual" punishments. See Brennan v. State, 754 So. 2d 1, 7-8 (Fla. 1999) (holding that the imposition of the death penalty on 16 year old is unconstitutional under the Florida Constitution even though it had been held constitutional under the U.S. Constitution). Although differences were noted, starting with Tillman v. State, 591 So. 2d 167 (Fla. 1991), this court had never interpreted or applied Florida's "cruel or unusual" clause any differently than the "cruel and unusual" provisions of the Eighth Amendment, as of November 1998.

Because legislative amendments can have more than one purpose and effect, the Attorney General and the Solicitor General respectfully submit that all reasonable doubts as to the "chief purpose" of a legislative amendment should be resolved in favor of the legislature, in the absence of intent to deceive. Clearly in this case, there is nothing in the record to support the majority's determination of the "chief purpose" or the "main (legal) effect", or that the voters were being misled by the Legislature.

D. IF VOTER APPROVAL OF A CONSTITUTIONAL AMENDMENT IS A "NULLITY" WHERE THE BALLOT SUMMARY IS NOT "ACCURATE", SUCH AMENDMENTS ARE VOID AB INITIO AND CANNOT BE

REVIVED BY THE PASSAGE OF TIME.

By failing to distinguish between a pre-election suit to remove a defective ballot summary and a post-election challenge to the validity of an election, the Court's holding in this case removes all time limitations and equitable defenses for post-election challenges to constitutional amendments. If voter approval is a "nullity", such amendments must be void ab initio and cannot be revived or saved by the passage of time.[10] The holding thereby creates great uncertainty regarding amendments approved by the voters in 1998, and before, and will encourage persons to wait until after elections to challenge the validity of constitutional amendments.

In ruling on the issue of standing in this case, the court determined that the Armstrong plaintiffs were not "dilatory" in filing their petition. Slip op. at 5-7. See also id. at 39-40 (Pariente, concurring). Thus, under the court's holding, a citizen or an ad hoc group of citizens may wait until 5 months after passage and filing of the joint resolution (or Constitution Revision Commission proposal) with the Secretary of State and less than 30 days before the election to challenge a proposed amendment. And, if the courts fail to rule on the merits of the challenge prior to the election, this Court will once again be in the position of having to nullify a democratic vote of the people with no showing that the outcome of the election was actually affected (and no opportunity to correct the allegedly defective ballot language).

The Court further holds that voter approval is a "nullity" and rejects the notion that voter approval can cleanse defects in the ballot summary that "go to the heart" of the

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[10] See Ramagli Realty Co. v. Craver, 121 So.2d 648, 654 (Fla. 1960).

amendment. Slip op. at 8. Clearly, under the court's opinion, a challenge would never be "filed too late" where there is "hoodwinking" or "deception of the voting public".[11] The Court's holding thus presents the following question: Does every violation of the court's "accuracy" requirement constitute a legislative hoodwinking and deception of the voting public? Or, did the court in this case specifically find that the legislature intended to deceive and hoodwink the voting public by "flying under false colors" (slip op. at 19-22) and "hiding the ball" (id. at 22-23).

If it is never too late to challenge a constitutional amendment on the basis that the ballot summary was not "accurate", other amendments to the Florida Constitution could be open to challenge.[12] For example, Florida's right to privacy in Article I, section 23 (hereafter "Privacy Amendment") is apparently subject to the same argument launched by the plaintiffs in this case. The 1980 ballot summary for the Privacy Amendment simply stated:

> Proposing the creation of Section 23 of Article I of the State Constitution establishing a constitutional right of privacy.

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[11] See generally 35 Fla. Jur. 2d Limitations and Laches § 120 (setting forth elements of laches, none of which can be squarely applied in the context of a challenge to a constitutional amendment based upon an allegedly defective ballot summary).

[12] Appellees acknowledge that this Court has refused to revisit the issue of the sufficiency of ballot language challenged and specifically approved prior to an election. See Lane v. Chiles, 698 So.2d 260, 264-65 (Fla. 1997); Ray v. Mortham, 742 So.2d 1276, 1284-85 (Fla. 1999). However, there is nothing within the Court's holding in this case to prevent a challenge to the ballot sufficiency of an amendment not previously passed upon by this Court.

Fla. CS/HJR 387 (1980) (reprinted in 1980 Laws of Fla., at 1788-89).

An argument might be made that the ballot summary for the Privacy Amendment was not "accurate" as it failed to inform the voters of the amendment's "true meaning and ramifications." Cf. Slip op. at 22-23. The ballot summary made no attempt to explain the amendment and was specifically silent as to the legal ramifications of the adoption of a separate state right of privacy particularly as it relates to abortion. As evident from the legislative special session and adverse public reaction in response to this Court's decision in In re T.W., 551 So.2d 1186 (Fla. 1989), it is "impossible to say with any certainly" whether the voters would have approved the Privacy Amendment had the ballot summary fully informed them of the legal ramifications of the amendment. Cf. slip op. at 29 (applying that standard to the ballot summary for Amendment No. 2).

The ballot summary for the Privacy Amendment also did not inform voters that the United States Constitution had been interpreted to include a right of privacy. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965). Indeed, if the ballot summary informed the voters of anything, it implied that their right of privacy was not currently protected. As Justice Shaw recently commented in Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 25 Fla. L. Weekly S546, S552 (Fla. July 13, 2000) (Shaw, J., concurring), a ballot summary may be misleading where it implies that a constitutional right is being created when, in fact, that right already is protected under the federal or state constitutions.

In 1998, the people approved 11 amendments/revisions to the Florida Constitution in addition to Amendment No. 2. The decision in this case might render each of those amendments vulnerable to challenge. Given the broad scope and multiple subjects contained in those amendments/revisions, it is possible that a challenge might be made to an amendment/revision because its ballot summary failed to advise the voters of the "chief purpose" or "main (legal) effect" of the amendment/revision. For example, the ballot summary for Revision No. 11 did not inform voters that the existence of a write-in candidate in one party would have the effect of precluding an "open primary" for the other party's candidate. Similarly, the ballot summary for Revision No. 7 does not inform the voters of the legal effect, if any, of adding the phrase "male and female alike" to Article I, section 2 of the constitution.

CONCLUSION

Based upon the grounds stated in the Motion for Rehearing (filed September 22) and this supporting memorandum, the Attorney General and the Solicitor General respectfully request this Court to reconsider its decision in this case and grant rehearing.

House Joint Resolution No. 3505

A joint resolution proposing an amendment to s. 17, Art. I of the State Constitution, relating to excessive punishment.

Be It Resolved by the Legislature of the State of Florida:

That the amendment to Section 17 of Article I of the State Constitution set forth below is agreed to and shall be submitted to the electors of Florida for approval or rejection at the general election to be held in November 1998:

SECTION 17. Excessive punishments.--Excessive fines, cruel and ~~or~~ unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the Legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

BE IT FURTHER RESOLVED that in accordance with the requirements of section 101.161, Florida Statutes, the title and

substance of the amendment proposed herein shall appear on the ballot as follows:

PRESERVATION OF THE DEATH PENALTY;
UNITED STATES SUPREME COURT
INTERPRETATION
OF CRUEL AND UNUSUAL PUNISHMENT

Proposing an amendment to Section 17 of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.

Filed in Office Secretary of State May 5, 1998.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.